

1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 *****

4 Court File No. 62-CV-19-4626

5 Judge John H. Guthmann

6 In the Matter of the Denial

7 of Contested Case Hearing

8 Requests and Issuance of National

9 Pollutant Discharge Elimination

10 System/State Disposal System,

11 Permit No. MN0071013 for the

12 Proposed NorthMet Project,

13 St. Louis County, Hoyt Lakes,

14 and Babbitt, Minnesota.

15 *****

16 EVIDENTIARY HEARING

17 THURSDAY, JANUARY 23, 2020

18 VOLUME III, DAY 3 OF 7 (pp. 426 - 645)

19 *****

20 The evidentiary hearing (Day 3 of 7) came on

21 before the Honorable John H. Guthmann, District Court

22 Judge, in Ramsey County District Court on Thursday, the

23 23rd day of January, 2020.

24 *****

25 REPORTED BY: Lori Morrow, RMR, RPR, CRR, CLR, CBC

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A P P E A R A N C E S:

On Behalf of Center for Biological Diversity, Friends of
the Boundary Waters Wilderness, and Minnesota Center for
Environmental Advocacy:

William Z. Pentelovitch, Esquire

Evan A. Nelson, Esquire

Margo S. Brownell, Esquire

MASLON LLP

90 South Seventh Street, Suite 3300

Minneapolis, Minnesota 55402-4140

(612) 672-8200

bill.pentelovitch@maslon.com

evan.nelson@maslon.com

margo.brownell@maslon.com

- and -

Matthew C. Murphy, Esquire

NILAN JOHNSON LEWIS, P.A.

120 South Sixth Street, Suite 400

Minneapolis, Minnesota 55402

(612) 305-7500

mmurphy@nilanjohnson.com

- and -

(APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 ALSO On Behalf of Center for Biological Diversity,
3 Friends of the Boundary Waters Wilderness, and Minnesota
4 Center for Environmental Advocacy:

5 Elise L. Larson, Esquire

6 MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

7 1919 University Avenue West, Suite 515

8 St. Paul, Minnesota 55104

9 (651) 223-5969

10 elarson@mncenter.org

11

12 On Behalf of WaterLegacy:

13 Paula Goodman Maccabee, Esquire

14 JUST CHANGE LAW OFFICES

15 1961 Selby Avenue

16 St. Paul, Minnesota 55104

17 (651) 646-8890

18 pmaccabee@justchangelaw.com

19

20

21

22

23

24

25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of Fond du Lac Band of Lake Superior Chippewa:

3 Vanessa Ray-Hodge, Esquire

4 SONOSKY, CHAMBERS, SACHSE, MIELKE & BROWNELL, LLP

5 500 Marquette Avenue, N.W., Suite 660

6 Albuquerque, New Mexico 87102-5302

7 (505) 247-0147

8 vrayhodge@abqsonosky.com

9 - and -

10 Matthew L. Murdock, Esquire

11 SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

12 1425 K Street, N.W.

13 Washington, D.C. 20005

14 (202) 682-0240

15 mmurdock@sonosky.com

16 - and -

17 Sean Copeland, Esquire

18 FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA LEGAL

19 AFFAIRS OFFICE

20 1720 Big Lake Road

21 Cloquet, Minnesota 55720

22 (218) 878-2607

23 seancopeland@fdlrez.com

24
25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of Minnesota Pollution Control Agency:

3 Richard E. Schwartz, Esquire

4 John Martin, Esquire

5 Bryson C. Smith, Esquire

6 HOLLAND & HART LLP

7 25 South Willow Street, Suite 200

8 Jackson, Wyoming 83001

9 (307) 734-4507

10 jcmartin@hollandhart.com

11 bcsmith@hollandhart.com

12 - and -

13 Caryn A. Boisen, Esquire

14 Larson King, LLP

15 30 East 7th Street, Suite 2800

16 St. Paul, Minnesota 55101

17 (651) 312-6500

18 cboisen@larsonking.com

19
20
21
22
23
24
25 (APPEARANCES continued on the next page.)

1 APPEARANCES (CONTINUED):

2 On Behalf of PolyMet Mining, Inc.:

3 Monte A. Mills, Esquire

4 Davida S. McGhee, Esquire

5 GREENE ESPEL P.L.L.P.

6 222 South Ninth Street, Suite 2200

7 Minneapolis, Minnesota 55402-3362

8 (612) 373-0830

9 mmills@greeneespel.com

10 dwilliams@greeneespel.com

11 - and -

12 Kathryn K. Floyd, Esquire

13 Kyle W. Robisch, Esquire

14 Venable LLP

15 600 Massachusetts Avenue, N.W.

16 Washington, D.C. 20001

17 (202) 247-5050

18 kkfloyd@venable.com

19 kwrobisch@venable.com

20
21 ALSO PRESENT: Adonis Neblett, General Counsel, Minnesota

22 Pollution Control Agency

23 Benjamin J. Grillot, Esquire, U.S.

24 Department of Justice

25 *****

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5		Ms. Lotthammer to Ms. Bishop,
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Exhibit 1133 PolyMet NPDES/SDS Permit -

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1 P R O C E E D I N G S

2 THE CLERK: All rise. Ramsey County District
3 Court is now in session, the Honorable John H. Guthmann
4 presiding.

5 THE COURT: Have a seat, please.

6 Good morning, everybody.

7 ALL: Good morning, your Honor.

8 THE COURT: Are we ready to proceed?

9 MR. NELSON: Evan Nelson for Relators.

10 This Friday we had planned to call Mr. Mike
11 Gallegos, G-a-l-l-e-g-o-s, of Xact Data Discovery to
12 testify as to the forensic search the Court had ordered
13 previously. We received a report from Xact on Tuesday,
14 January 21, written by Mike Gutierrez, G-u-t-i-e-r-r-e-z.
15 And we would like to, instead of Mr. Gallegos, call
16 Mr. Gutierrez to testify as to the contents of that
17 report and explain for the Court what difference the
18 search entailed, what it found, what it did not find.
19 Mr. Gutierrez was not on our witness list earlier, and so
20 we ask the Court's permission to call Mr. Gutierrez
21 instead of Mr. Gallegos.

22 THE COURT: So you want to call the guy who
23 really did the work?

24 MR. NELSON: Precisely.

25 THE COURT: Any objection?

1 MR. SMITH: Yes, your Honor. Good morning.
2 Bryson Smith from MPCA.

3 As you are aware, the witness deadline was on
4 December 9. Relators requested a forensic report from
5 Xact on January 15, so just last week. At that point,
6 the report was compiled by Xact and produced to all
7 parties this Tuesday, January 21. Only last night the
8 Relators seeked to change the testimony of Mr. Gallegos,
9 who has at all times been the point of contact from Xact
10 with both Relators and MPCA. So we have never had any
11 contact with Mr. Gutierrez. Had we known that he would
12 be the one to testify, we could have reached out to him
13 and, obviously, copying Relators, there to be no ex parte
14 communications with Xact. However, we think that, given
15 that the parties agreed to retain Xact as early as late
16 November, well before the witness deadline, all parties
17 were on notice that they could have reached out and
18 figured out who would be the best person from Xact to
19 testify on this matter.

20 Moreover, the report that Relators requested
21 from Xact, we think, is manufactured evidence at this
22 point. Again, Relators didn't request that report until
23 January 15, right before the hearing -- or actually,
24 after the hearing started -- sorry, right before the
25 hearing started last week. So it's last-minute evidence.

1 And moreover, an independent reason, we think
2 this goes well beyond the scope of this hearing. Again,
3 this is about alleged procedural irregularities by MPCA
4 and has nothing to do with getting into what the search
5 terms were, things like that. That's a discovery dispute
6 for which the ship has sailed.

7 At this point, we need to look at the documents
8 that are actually in evidence and deal with those. For
9 that reason, we would also oppose the scope -- or the
10 testimony from Xact as going beyond the scope. For the
11 same reasons, we don't want experts testifying about
12 sulfides, methylmercury, which you said was a science
13 lesson beyond the scope of this hearing, so, too, would a
14 lesson in computer science.

15 THE COURT: So if the original witness
16 testified with regard to that report, you wouldn't
17 object?

18 MR. SMITH: We would not object on the grounds
19 that he wasn't on the witness exhibit list, but we would
20 object on the grounds that it goes beyond the scope of
21 this hearing.

22 THE COURT: Well, that would have arguably been
23 a motion in limine that you didn't make.

24 MR. SMITH: With respect, your Honor, we did
25 request in our motion in limine to exclude the testimony

1 of Mr. Gutierrez.

2 THE COURT: You're right. How about that. I
3 denied that. It's all coming back now.

4 Well, here's the problem. The reason that a
5 forensic search was ordered was to uncover evidence of
6 procedural irregularities that are relevant to the case.
7 So you're right to the extent that we aren't going to be
8 reliving discovery disputes. So I would expect that,
9 regardless of which witness testifies, that the subject
10 of their testimony is an overview of what they did and
11 what they found or what they didn't find. And that would
12 be about it, right?

13 MR. NELSON: That is correct, your Honor. We
14 would not ask any questions relating to search terms, the
15 process for selecting search terms, or anything that had
16 to do with the discovery disputes in this matter.

17 THE COURT: I mean, there's nothing wrong with
18 the term "search terms" coming up. It's like, I used
19 search terms, I entered them, I got this or I didn't get
20 this. That's the procedure of a forensic search
21 generally. I mean, that's part of the foundation for any
22 witness' testimony.

23 How are you prejudiced by the change of
24 person --

25 MR. SMITH: Again, your Honor --

1 THE COURT: -- and what would ameliorate that
2 prejudice?

3 MR. SMITH: -- had we known which
4 representative from Xact would testify, again, we could
5 have reached out, obviously copying all parties, to talk
6 to that person about what the contents of their testimony
7 would be. It appears that part of the contents of that
8 testimony will be about this January 15 report, which,
9 again, was a post hoc report done well after the fact,
10 after exhibits were designated, after witnesses were
11 designated. And to the extent that your Honor is talking
12 about figuring out what was discovered during the search,
13 you know, all responsive, non-privileged documents from
14 the forensic search have been produced.

15 Moreover, your Honor requested in the forensic
16 search order that any documents that Xact determined were
17 deleted and then recovered be so designated in that
18 production. So we just don't think there's any value
19 added by having someone from Xact talk about a report
20 that was prepared just last week at the request of
21 Relators.

22 THE COURT: And when did you get the report?

23 MR. SMITH: Tuesday, your Honor.

24 THE COURT: And you've read the report?

25 MR. SMITH: Yes, your Honor.

1 THE COURT: Okay. So -- all right.

2 MR. NELSON: Your Honor, if I may. As to the
3 timing of the report, we did not receive the forensic
4 search production until January 7 when we were, I think
5 it's fair to say, shoulder deep in hearing preparation.

6 We requested the report you made to us on the
7 15th. Mr. Smith is correct. That was not any effort to
8 ambush anybody. It was just a matter of the logistics of
9 the time that we had. And we wanted to receive the
10 report as soon as possible. It was -- the request was
11 made in light of all counsel. The report has been shared
12 with all counsel. I don't believe anybody was prejudiced
13 as to the timing of this report.

14 THE COURT: All right. Number one, one of the
15 reasons we're in the time crunch is because of the
16 violation of my order regarding the neutrality of Xact,
17 which required me to change the approach to this
18 discovery process midstream, and I issued an order in
19 that regard. So part of that is of your own making. If
20 there was a delay in getting this information before the
21 hearing, that's the prime reason for the delay.

22 Number two, you're right, you're entitled to
23 have contact with this witness before the witness
24 testifies, and you can go ahead and do that. Designate
25 an attorney or someone that you would like to talk to

1 that witness, and I will not allow that witness to
2 testify until that conversation has taken place, and
3 Relators should designate somebody to be on the line or
4 be present if it's an in-person meeting, which is
5 consistent with the Court's instructions with regard to
6 the forensic expert in the written order that I issued in
7 December.

8 So I think that will take care of the issue of
9 prejudice, because it's obvious that the person who
10 really did the work is the better witness, and it will be
11 less frustrating for everyone to have the person who
12 really did the work. I am making an allowance to get
13 your questions answered before that person testifies. I
14 won't allow them to testify until that gets done. And if
15 you want that person to testify at a certain time, I
16 suggest that you work really hard to make sure that this
17 meeting is going to be done in time for that witness to
18 testify is scheduled.

19 MR. NELSON: Your Honor, I'll work with
20 opposing counsel before the break and get this figured
21 out.

22 MR. SMITH: We will, too, your Honor.

23 MR. NELSON: Thank you, your Honor.

24 MR. SMITH: Thank you, your Honor.

25 THE COURT: All right.

1 Anybody else?

2 MR. PENTELOVITCH: May I continue with
3 Mr. Stine, please?

4 THE COURT: Mr. Stine is ready.

5 Mr. Stine, have a seat. You remain under oath.

6 THE WITNESS: Thank you, your Honor.

7 CROSS-EXAMINATION (CONTINUING):

8 BY MR. PENTELOVITCH:

9 Q Good morning, Mr. Stine.

10 A Good morning.

11 Q As commissioner of the Pollution Control
12 Agency, who did you report to?

13 A I reported to the Governor's chief of staff and
14 to the Governor.

15 Q And who was the chief of staff during the
16 period from July of 2016 through December of 2018?

17 A There were two people that occupied that
18 position during that time, to my recollection, Ms. Jaime
19 Tincher and Ms. Joanna Dornfeld.

20 THE COURT: Any idea on the spelling of the
21 first name?

22 THE WITNESS: Jaime is J-a-i-m-e, last name is
23 T-i-n-c-h-e-r. Joanna is J-o-a-n-n-a, Dornfeld,
24 D-o-r-n-f-e-l-d.

25 BY MR. PENTELOVITCH:

1 Q At any time between July of 2016 and December
2 of 2018 when the permit issued, did you have
3 conversations with either Governor Dayton or either of
4 his chiefs of staff about the PolyMet permit application
5 or the PolyMet permit?

6 A Yes.

7 Q Okay. On how many occasions did you speak to
8 the Governor about it?

9 A I don't recall.

10 Q On how many occasions did you speak to his
11 chiefs of staff about it?

12 A Again, I don't recall.

13 Q Do you recall whether you had any conversations
14 with either Governor Dayton or his chiefs of staff about
15 the permit during the public comment period from
16 January 31 to March 16 of 2018?

17 A I don't recall during that period of time.

18 Q Do you recall whether you had any conversations
19 with Governor Dayton or his chiefs of staff immediately
20 prior to the March 12 phone call that you had with Cathy
21 Stepp and Kurt Thiede?

22 A No, I don't recall.

23 Q Do you recall whether at any time you reported
24 to Governor Dayton or his chiefs of staff on your
25 conversation with Cathy Stepp or Kurt Thiede?

1 A No, I don't recall.

2 Q Was it your habit to make memoranda of
3 conversations you had with the Governor or chiefs of
4 staff?

5 A No, it was not.

6 Q So there would be no written record that could
7 help refresh your recollection as to which conversations
8 you had with Governor Dayton or his chiefs of staff about
9 the PolyMet permit during the public comment period?

10 A To my knowledge, no.

11 Q Did you have an Outlook Calendar on which you
12 kept your schedule?

13 A Generally, yes, I did.

14 Q Would the Outlook Calendar have shown occasions
15 on which you would have had conversations with either
16 Governor Dayton or his chiefs of staff?

17 A Possibly they would have been there if they
18 were scheduled conversations. Some of the conversations
19 were phone calls that I received from others or that I
20 made without scheduling it on my calendar.

21 Q When you spoke to Governor Dayton or his chiefs
22 of staff about the PolyMet permit, was it generally on
23 the telephone or in person?

24 A There were occasions where we spoke on the
25 phone and occasions where we were in person, generally

1 associated with other meetings or other events.

2 Q Do you recall any conversations that you had
3 with Governor Dayton about the PolyMet permit?

4 A Yes. I recall a conversation -- I don't recall
5 the date of it, but I recall his questioning me on the
6 timing of the decision that would be made, what the
7 agency's activities related to the permit were. It was
8 of a general nature, not specific to any interactions
9 with parties to the permit but mostly just giving him an
10 update about the proposal.

11 Q What did Governor Dayton say to you about the
12 timing of the permits?

13 A The Governor didn't have any comments on
14 timing.

15 Q I thought you said he had asked you questions
16 about that.

17 A He did. He wanted to know. But his questions
18 were what's the timeline you're operating under, what
19 kind of expectation do you have for your decision on this
20 as far as the timing lines.

21 Q Did Governor Dayton ever express an opinion as
22 to what he thought the timing should be?

23 A No, he did not.

24 Q How about his chiefs of staff, did they ever do
25 that?

1 A No, not to my recollection.

2 Q Did you ever discuss with Governor Dayton or
3 his chiefs of staff the fact that EPA was not putting its
4 comments into writing?

5 A I don't recall having any conversation with him
6 or the chiefs of staff regarding that.

7 Q While you were commissioner, I'd like to know
8 about the electronic devices that you utilized in your
9 work. Did you have a cell phone that you utilized?

10 A Yes.

11 Q Did that belong to the state, or did it belong
12 to you?

13 A It belonged to the state.

14 Q When you left your job as commissioner, what
15 became of that cell phone?

16 A I turned it in to the agency.

17 Q Did you delete anything from it before you did
18 so?

19 A I don't recall.

20 Q Is the cell phone that you turned in the one
21 you had throughout the period from July of 2016 through
22 December of 2018?

23 A I don't remember the dates of -- I switched
24 from a Samsung model phone to an iPhone at some point,
25 but I don't recall the date that that change occurred.

1 It was the same telephone number, but the device may have
2 changed, but I don't recall the date of that change.

3 Q So the phone you turned in at the end of your
4 tenure was an iPhone?

5 A That's correct.

6 Q Okay. Do you remember what model iPhone?

7 A I don't.

8 Q During your tenure -- I'm sorry. During the
9 period of July 2016 to December 2018, did you use a
10 tablet of any -- an electronic tablet of any form?

11 A No.

12 Q So you didn't have an iPad or a Samsung tablet
13 or anything like that that you utilized?

14 A Not to my recollection, no.

15 Q Did you have a laptop computer?

16 A Yes, I did.

17 Q What model -- what kind of laptop?

18 A To my recollection, it was a Dell.

19 Q So it was a Windows-based device?

20 A Yes. To my recollection, it was a PC.

21 Q Okay. And was that laptop property of the
22 state, or was that your own property?

23 A That would have been the state's.

24 Q Okay. What became of that when you left the --
25 when you left office?

1 A I turned it in to the agency.

2 Q Had you deleted anything from it before you did
3 so?

4 A I was cleaning off a number of my files that
5 were unnecessary. I don't recall what I deleted, but
6 there were things that were deleted, yes.

7 Q Did you delete anything relating to PolyMet?

8 A To my knowledge, no.

9 Q During the period of time that you were
10 commissioner, July 2016 to December 2018, did you have a
11 personal laptop that you used that you did not turn in to
12 the government when you left?

13 A No.

14 Q Did you have a personal tablet?

15 A No.

16 Q Did you have a personal separate cell phone?

17 A Yes.

18 Q Okay. What became of that when you left
19 office?

20 A I still have it.

21 Q Have you deleted anything from it that related
22 to your work as commissioner?

23 A No. I never transferred anything on it to my
24 personal phone that was work related.

25 Q So, for example, your personal phone did not

1 connect to your work email?

2 A Correct.

3 Q So that there would be no duplication. Is that
4 right?

5 A Yeah. My goal was to have my personal life on
6 my personal phone and my work life on my work phone.

7 Q So you never forwarded any work emails to a
8 personal email account such as a Gmail account or a
9 Hotmail account?

10 A Not to my recollection.

11 Q Did you have a work desktop when you were the
12 commissioner?

13 A No, I did not.

14 Q So you just did everything off the laptop?

15 A That's correct.

16 Q Okay. And did you change laptops at all during
17 the period July '16 to December '18?

18 A Not to my recollection.

19 Q Thank you.

20 THE COURT: Thank you.

21 MR. PENTELOVITCH: Your Honor, I'm handing the
22 witness Exhibit 35, which, for the record, is a draft
23 NPDES permit. And I believe, if I've done this
24 correctly, this is the one that was put on public notice
25 in January of 2018.

1 THE COURT: I believe it's already been
2 received.

3 MR. PENTELOVITCH: In that case, I don't have
4 to do anything more with it.

5 THE COURT: It's already been received.

6 MR. PENTELOVITCH: Okay. Thank you.

7 Let me give you one more exhibit before I start
8 asking questions. This will be Exhibit 36, which is the
9 notice of public hearing and fact sheet that was
10 published in January of 2018 to the public. And --

11 THE COURT: That was also received previously.

12 MR. PENTELOVITCH: All right. Thank you.

13 BY MR. PENTELOVITCH:

14 Q Mr. Stine, did you review Exhibits 35 or 36
15 prior to their being issued for public notice and
16 comment?

17 A No.

18 Q Did you review any portion of them before that
19 occurred?

20 A No.

21 Q I would ask you to turn in Exhibit 36 to page
22 number 4. And before I ask you a specific question on
23 page 4, you knew that Exhibits 35 and 36 were provided to
24 the tribes and to the MPCA ahead of being posted for
25 public notice, correct?

1 A That was my understanding.

2 Q On page 4, under the heading "Purpose and
3 Participation," you notice it says, "You may submit
4 written comments on the terms of the draft permit or on
5 the Commissioner's preliminary determination."

6 Do you see that?

7 A Yes.

8 Q And then there's some instructions for what the
9 written comments must include. And then at the bottom of
10 the page, the last paragraph says, "You must submit all
11 comments, requests, and petitions during the public
12 comment period identified on page 1 of this notice." And
13 it goes on from there.

14 To your knowledge, was the EPA excluded from
15 the invitation to comment contained in the notice on
16 page 4 here?

17 A No.

18 Q You can set those exhibits aside.

19 MR. PENTELOVITCH: Your Honor, I'm handing you
20 and the witness Exhibit 333, which I believe has already
21 been admitted.

22 THE COURT: It has.

23 BY MR. PENTELOVITCH:

24 Q Mr. Stine, I'm showing you Exhibit 333, which
25 is an email from Sharon [sic] Lotthammer to Kurt Thiede

1 dated March 13, 2018. That was the day after your phone
2 conversation with Cathy Stepp and Kurt Thiede that we
3 discussed yesterday, correct?

4 A Yes.

5 Q Did you see the text of this email before
6 Ms. Lotthammer sent it to Mr. Thiede?

7 A Not to my recollection.

8 Q I know you're not cc'd on this, but were you
9 shown a copy of this email at or about the time or
10 shortly after the time Ms. Lotthammer sent it to
11 Mr. Thiede?

12 A I don't recall.

13 Q Did you discuss the contents of this email with
14 Ms. Lotthammer at any time?

15 A Only in a general sense that I had given
16 her name and contact information to Cathy Stepp and
17 Kurt Thiede following our phone call the previous day.

18 Q Did you give Ms. Lotthammer any guidance or
19 instruction as to what she should include in her
20 communications to Mr. Thiede or Ms. Stepp?

21 A No. I considered it her delegated authority to
22 communicate whatever she deemed appropriate.

23 Q Calling your attention to the third paragraph
24 of Exhibit 333, Ms. Lotthammer wrote, "As you'll note in
25 the highlighted portions on pages 27-28 of the attached

1 pdf (which are pages 10-11 of the actual MOA), the
2 established process is for MPCA to place the draft permit
3 on public notice, consider and respond to public comments
4 and make any resulting changes that are necessary."

5 Now, so far that's something you would agree
6 with, correct?

7 A That's correct.

8 Q And then she goes on to say, "and then, to
9 submit the proposed permit to EPA for review and comment
10 (which could include objection) prior to final issuance."
11 Right?

12 A That's what the email says, yes.

13 Q Now, it is true that after the public comment
14 period you could submit it to EPA again under the
15 memorandum of understanding, right?

16 A Could you repeat that? After?

17 Q I'll tell you what. Let's make it easier for
18 you. Turn, if you would, in Exhibit 333 -- and this
19 is -- you're going to have to kind of go to the back here
20 a bit, but it's the pages that she is referencing, to the
21 pages 10-10 and 11, which have numbers in the corner, the
22 lower right-hand corner of each page ending in 806 and
23 807. Are you with me?

24 A Not yet. I'm sorry.

25 Q It's going to be almost at the very end of the

1 exhibit. Do you see pages 10 and 11?

2 A I see pages 10 and 11, but they don't
3 correspond to the numbers you just gave me.

4 Q Can I come up and take a look?

5 A Sure.

6 Q You're right. But we will ignore the Bates
7 numbers that I mentioned to you because I'm looking at a
8 different copy. But you do have pages 10 and 11, and
9 they are the correct pages, 10 and 11. That's the
10 problem with having many copies of a document in
11 discovery.

12 I want you to turn back one page, though, to
13 page 9, if we could. Section 124.46(1) talks about what
14 you, the director, must do at the time a public notice is
15 issued. And it says, and I'm quoting now, "the Director
16 shall transit one copy of the NPDES public notice, fact
17 sheets, proposed NPDES permit and a list of all persons
18 receiving the public notice, fact sheets and proposed
19 NPDES permit, together with a description of any other
20 procedure used to circulate the public notice, to the
21 Regional Administrator, Attention: NPDES Permit Branch."
22 And then it goes on to talk about what should be
23 included.

24 So this is the part of the MOA that requires
25 you at the time of public notice to give the fact sheet

1 and the draft notice to the EPA, right?

2 A Yes.

3 Q Okay. Let's look at paragraph (2). It says,
4 "After a public notice period has" -- oh, let me back up
5 one second. There's nothing in paragraph (1), and you
6 can read it to yourself if you need to, that addresses
7 whether the EPA should, should not, will, or will not
8 comment on the draft permit during the public notice
9 period, correct?

10 A That is correct.

11 Q Okay. Now, if we go to sub (2), it says,
12 "After a public notice period has expired, the Agency
13 shall consider all comments received as a result of the
14 public notice and may modify the proposed NPDES permit as
15 it considers appropriate." And then it goes on to talk
16 about public hearings, correct?

17 A Yes.

18 Q Then we go to page 10, which is the page that
19 Ms. Lotthammer -- and subparagraph C says -- subparagraph
20 (3) rather, not C. "If a proposed NPDES permit issued
21 with a public notice is modified as a result of the
22 public notice or public hearing, a revised copy of the
23 proposed NPDES permit shall be transmitted to the
24 Regional Administrator, Attention: NPDES Permit Branch."
25 And then it says what must accompany that, correct?

1 A Yes.

2 Q And the next section says, "If a proposed NPDES
3 permit is not revised after a public notice or where
4 held, a public hearing, the Director shall notify the
5 Regional Administrator, Attention: NPDES Permit Branch
6 by letter that the proposed NPDES permit issued with the
7 public notice has not been revised and request approval
8 to issue the NPDES permit." Correct?

9 A That is correct.

10 Q Okay. And then paragraph (5) says, "The
11 Regional Administrator shall respond within 15 days from
12 the date of receipt of the letter requesting final
13 approval to issue or deny the proposed permit. The
14 Regional Administrator pursuant to any right to object
15 provided in section 402(d)(2) of the Act, may comment
16 upon, object to or make recommendations with respect to
17 the proposed NPDES permit." Correct?

18 A Yes.

19 Q So what the MOA contemplates is basically a
20 two-step or three-step process. It begins with public
21 notice and a public comment period, during which the EPA
22 may or may not comment, followed by public hearings, if
23 required. And if revisions are made to the permit, the
24 permit then goes back to the EPA, right?

25 MR. MARTIN: Your Honor, I'm going to object to

1 this line of questioning. The document speaks for
2 itself.

3 THE COURT: Overruled. The question is
4 relating to this witness' understanding of the document.

5 MR. PENTELOVITCH: Correct.

6 BY MR. PENTELOVITCH:

7 Q And that's your understanding, right?

8 A Generally, yes.

9 Q Okay. And if the permit has not been revised,
10 the EPA is told that by the PCA, right?

11 A That's correct.

12 Q And at that point, the EPA has another chance
13 to comment or to object, right? That's what paragraph
14 (5) provides.

15 A Essentially, yes. I agree with that.

16 Q And if no written comment is received within
17 the 15-day period, you were entitled to assume that the
18 EPA had no objection, correct?

19 A That's correct.

20 Q And if there were comments or objection, then
21 paragraphs (6) and (7) talk about what has to happen
22 after that, right?

23 A Yes.

24 Q Okay. Let's go back to the email from
25 Ms. Lotthammer then. Looking at the third paragraph of

1 the email that's the front page of Exhibit 333, she does
2 not address in that third paragraph whether or not the
3 EPA had the ability or the right to comment during the
4 public comment period, right?

5 A Correct.

6 Q Looking at the next paragraph, Ms. Lotthammer
7 wrote, "The concern we have expressed to Region 5
8 staff/managers is the timing of EPA comments, not the
9 ability for EPA to comment."

10 Is that consistent with your conversation with
11 Mr. Thiede and Ms. Stepp on March 12?

12 A Yes, in general terms. I also expressed to
13 them my concern over the efficiency of the staff's work
14 activities in that phone conversation.

15 Q Okay. The next sentence says, "The draft
16 permit that is the subject of this discussion is on
17 public notice until March 16."

18 Now, that would have been three days after this
19 email, correct?

20 A Yes.

21 Q Did you know at this point in time how many
22 public comments had been received or from whom?

23 A Is your question did I know at the time of this
24 email --

25 Q Yeah.

1 A -- how many had been submitted?

2 Q Yeah.

3 A In general terms, I was aware that there were a
4 significant number, but I was not aware of the exact
5 number or the persons that were submitting those
6 comments.

7 Q Do you know whether as of March 13 any of the
8 Relators had submitted their comments?

9 A I'm not aware.

10 Q Okay. Then Ms. Lotthammer goes on and says,
11 "We know that we will be making some changes to the draft
12 permit in response to public comment, and also questions
13 raised by EPA."

14 How did PCA know that on March 13?

15 A My understanding is that the staff was working
16 on response to the comments and had already formulated
17 ideas on how to make changes and prepare those for
18 incorporation into the permit.

19 Q That paragraph goes on with the next sentence.
20 "We have asked that EPA Region 5 not send a written
21 comment letter during the public comment period and
22 instead follow the steps outlined in the MOA and wait
23 until we have reviewed and responded to public comments
24 and made associated changes before sending comments from
25 EPA."

1 Nothing in the MOA that we just looked at says
2 that the EPA cannot comment during the public comment
3 period, correct?

4 A That's correct. It's their -- they have
5 ability to comment during the comment period.

6 Q So why was Ms. Lotthammer, to your knowledge,
7 saying that the EPA should, quote, instead follow the
8 steps outlined in the MOA?

9 MR. MARTIN: Objection, beyond this witness'
10 personal knowledge. This witness did not -- had not
11 reviewed the document --

12 THE COURT: Okay. Just make the objection.
13 Objection sustained. Calls for speculation, no
14 foundation.

15 BY MR. PENTELOVITCH:

16 Q Did you discuss with Ms. Lotthammer the portion
17 of this email which says that EPA should, quote, instead
18 follow the steps outlined in the MOA?

19 A That sentence in particular or the construct of
20 that sentence, no, I did not discuss with her. I did
21 discuss the fact -- I wanted to know in conversation with
22 her how the input from the EPA was being collected. She
23 reminded me that we were having numerous conference calls
24 with the EPA, the staff. And the EPA staff were in
25 direct communication about the permit conditions and

1 details.

2 Q Did you and Ms. Lotthammer ever discuss whether
3 or not the MOA allowed EPA to comment during the public
4 comment period?

5 A Not to my knowledge.

6 Q Did you ever express the opinion to her that
7 the MOA did not permit the EPA to comment during the
8 public period?

9 A No, not to my knowledge.

10 Q Did Ms. Lotthammer ever express to you her
11 opinion that the EPA could not comment during the public
12 comment period under the MOA?

13 A No, not to my knowledge.

14 Q Thank you.

15 I want to call your attention to the second to
16 the last, the penultimate paragraph of Exhibit 333. I'll
17 read the first sentence of that paragraph, which I'm not
18 going to ask you about, and then I'm going to read you
19 the second sentence.

20 "Again, I wish to stress - as I have with Chris
21 Korleski and Kevin Pierard - that the concern here is not
22 about EPA's authority for review. We recognize and
23 respect that authority. The question is about the timing
24 of that review, and the importance of maintaining the
25 approach laid out in the MOA for the sake of clarity and

1 efficiency, among other goals."

2 My question to you is, do you know what
3 Ms. Lotthammer meant when she talks about, quote, the
4 importance of maintaining the approach laid out in the
5 MOA?

6 MR. MARTIN: Objection, calls for speculation,
7 beyond the witness' personal knowledge.

8 THE COURT: Sustained [sic].

9 Calls for a yes or no answer.

10 THE WITNESS: Would you repeat the question?

11 MR. PENTELOVITCH: Could you read it back,
12 please?

13 THE COURT: Actually, I meant to say overruled.
14 Calls for a yes or no answer. But now you can read back
15 the question.

16 MR. PENTELOVITCH: I understood what you meant.

17 MR. MARTIN: Actually, I did, too.

18 THE COURT: It scares me, but let's go ahead.

19 THE COURT REPORTER: "I want to call your
20 attention to the second to the last, the penultimate
21 paragraph of Exhibit 333. I'll read the first sentence
22 of that paragraph, which I'm not going to ask you about,
23 and then I'm going to read you the second sentence.

24 "Again, I wish to stress - as I have with
25 Chris Korleski and Kevin Pierard - that the concern here

1 is not about EPA's authority for review. We recognize
2 and respect that authority. The question is about the
3 timing of that review, and the importance of maintaining
4 the approach laid out in the MOA for the sake of clarity
5 and efficiency, among other goals.'

6 "My question to you is, do you know what
7 Ms. Lotthammer meant when she talks about, quote, the
8 importance of maintaining the approach laid out in the
9 MOA?"

10 THE WITNESS: No.

11 BY MR. PENTELOVITCH:

12 Q You can put that exhibit aside -- actually, I'm
13 going to take that back. Take Exhibit 333 for one more
14 second. I have one more question for you.

15 Do you know what the, quote, approach laid out
16 in the MOA, closed quote, that she was referring to was?
17 I'm taking the word "importance" out of there. I'm just
18 asking if you know what approach she was referencing.

19 A No, other than she referred earlier in this
20 email to pages 10 and 11, I assume that it meant those
21 provisions.

22 Q Okay. Thank you. Turn now to Exhibit 60,
23 which is an email later that same day, which I believe is
24 already admitted.

25 THE COURT: Actually, it's not.

1 MR. PENTELOVITCH: Then we'll offer it.

2 THE COURT: Hearing no objection, it's
3 received.

4 BY MR. PENTELOVITCH:

5 Q Exhibit 60 has Ms. Lotthammer's March 13 email
6 at the bottom, and then there's a second email from her
7 from Mr. Thiede at the top. It's about an hour and a
8 half -- hour and 25 minutes later. Did you see the
9 second email of March 13 at or about the time it was
10 sent?

11 A Not to my recollection.

12 Q Did you discuss the second email with
13 Ms. Lotthammer at or about the time it was sent?

14 A I don't recall.

15 Q Ms. Lotthammer writes to Mr. Thiede as follows:
16 "I apologize for the multiple e-mails, but just wanted to
17 add that I would appreciate knowing that you received
18 this message and a head's up about EPA's intention, given
19 that the public comment period closes this Friday."

20 Do you know why Ms. Lotthammer wanted a
21 heads-up as to what EPA intended to do?

22 A No.

23 Q Did you and Ms. Lotthammer discuss wanting to
24 get a heads-up from EPA as to what their intention was
25 before the end of the public comment period?

1 A Not to my recollection.

2 THE COURT: You gave me two copies of 60. I'll
3 return one.

4 MR. PENTELOVITCH: Thanks.

5 BY MR. PENTELOVITCH:

6 Q Mr. Stine, I've handed you Exhibit 61, which I
7 don't believe is in evidence.

8 THE COURT: Hearing no objection, it's
9 received.

10 BY MR. PENTELOVITCH:

11 Q This is a continuation of the email chain that
12 we've been looking at.

13 Just at the midpoint of the first page of
14 Exhibit 61, above the last March 13 email we looked at,
15 there's an email from Mr. Thiede to Ms. Lotthammer about
16 25 minutes after her last email we just looked at. And
17 he wrote as follows: "Hi Shannon, yes, I have received
18 your correspondence and will plan to reach out yet this
19 evening. I've been in back-to-back meetings and have one
20 more to go. Will you be available after 5?"

21 And then Ms. Lotthammer responds, "After 5 is
22 fine." And that's on March 13.

23 Did you see either of those two emails on or
24 about March 13 of 2018?

25 A Not to my recollection.

1 Q Did you discuss them with Ms. Lotthammer on or
2 about March 13?

3 A I don't recall.

4 Q Did Ms. Lotthammer report to you that she had
5 heard back from Mr. Thiede?

6 A I don't recall.

7 Q Okay. Now, if you look at the top email on
8 that page, it's two days later, March 15, we are still a
9 day away from the end of the public comment period.
10 Mr. Thiede writes to Ms. Lotthammer, "Hi Shannon. This
11 email is a follow-up to my voice mail. Let me know a
12 good time today to connect."

13 My first question to you is, did Ms. Lotthammer
14 report to you on whatever conversation she had on
15 March 15 with Mr. Thiede?

16 A I don't recall.

17 Q Did you in the period March 12 to March 15 have
18 any further conversations with Mr. Thiede or Ms. Stepp
19 about what the EPA would be doing regarding commenting on
20 the PolyMet permit?

21 A Not to my recollection, no.

22 MS. MCGHEE: Your Honor, this is Davida McGhee
23 from PolyMet.

24 We would just like to request that
25 Mr. Pentelovitch announce which exhibit he's handing the

1 witness so that we have enough time.

2 MR. PENTELOVITCH: Oh, sure.

3 MS. MCGHEE: Thank you.

4 MR. PENTELOVITCH: I apologize. Exhibit 64 is
5 next.

6 MS. MCGHEE: Thank you.

7 THE COURT: 64 is already in evidence.

8 BY MR. PENTELOVITCH:

9 Q Showing you next what's been marked as
10 Exhibit 64, this is a stand-alone chain of emails, both
11 of which occurred on March 16, 2018. The first email
12 begins at the bottom of the page. It's from Mr. Thiede
13 to Ms. Lotthammer, and it is copied to a number of people
14 at the EPA. And the top email on the page is a response
15 from Ms. Lotthammer to Mr. Thiede on the same day
16 approximately an hour and 15 minutes later.

17 My first question to you is, did you see either
18 of these emails on or about March 16, 2018?

19 A I don't recall when I saw either. I obviously
20 was copied on the email response from Ms. Lotthammer to
21 Mr. Thiede, but 2:00 p.m. on the 16th, I don't recall
22 when I saw it.

23 Q Okay. Did you discuss the contents of either
24 email with her before she sent her email on March 16?

25 A I don't recall.

1 Q If you would turn to the second page of -- the
2 back side of Exhibit 64 -- well, I guess we have to start
3 on the front. Mr. Thiede writes, "Shannon, Thanks once
4 again for working with us to find a solution to this
5 matter. Here is our understanding of what EPA and MPCA
6 have agreed to."

7 And I then go on to the next page. "Once MPCA
8 completes their response to public comments, it will
9 develop a pre-proposed permit and provide the PPP to EPA
10 Region 5. Region 5 EPA will have up to 45 days to review
11 the PPP and MPCA's responses to public comments and
12 provide written comments on the PPP to MPCA. This would
13 occur prior to MPCA submitting a proposed permit to EPA,
14 which, according to the current MOA, would continue to
15 give EPA 15 days to comment upon, generally object to, or
16 make recommendations with respect to the proposed
17 permit."

18 My question to you is, did you discuss the
19 agreement as described here with Ms. Lotthammer prior to
20 the phone conversation with Mr. Thiede that is
21 memorialized in Exhibit 64?

22 A I don't recall a specific conversation about
23 that, quote-unquote, agreement.

24 Q Had you ever heard of such a thing as a
25 pre-proposed permit before?

1 A No.

2 Q Are you aware of there ever having been a
3 pre-proposed permit issued by MPCA for consideration by
4 EPA prior to March 16, 2018 in connection with any
5 permitting process?

6 A To my knowledge, no.

7 Q You would agree with me, would you not, that
8 there is nothing in the MOA which provides for a
9 pre-proposed permit or a comment period upon a
10 pre-proposed permit, correct?

11 A The MOA would be silent on that, I believe.

12 Q And you would agree with me that you and the
13 Region 5 administrator did not go through the process we
14 looked at yesterday in the MOA for amending or modifying
15 the MOA, which would then require approval by the
16 commissioner -- I'm sorry -- the national EPA
17 commissioner and director before the MOA could be
18 modified, right?

19 A There was no conversation about amending the
20 existing memorandum of agreement.

21 Q Do you know whose idea it was to create this
22 concept of a pre-proposed permit?

23 A I don't know in specific whose idea it was. I
24 believe it was from the staff of the agency, but I don't
25 know in specific terms.

1 Q Were you involved in any conversation --

2 THE COURT: Which agency?

3 THE WITNESS: Pollution Control Agency.

4 BY MR. PENTELOVITCH:

5 Q Were you involved in any conversations with
6 staff about the concept of a pre-proposed permit prior to
7 March 15 or 16, 2018?

8 A I don't recall.

9 Q Ms. Lotthammer's response to Mr. Thiede says,
10 "Thank you for your message. We concur with your
11 characterization below of what we have agreed to for the
12 PolyMet draft permit next steps."

13 When you received your copy of this email from
14 Ms. Lotthammer, did you read the agreement that
15 Mr. Thiede lays out in his portion of this document?

16 A Yes, though I don't recall when I read it.

17 Q When you did read it, did you go to anyone and
18 say, what is a pre-proposed permit?

19 A I believe at the point that this email was read
20 and I followed up with Shannon in the days following it,
21 yes, we did discuss these provisions.

22 Q Okay. What did you say to her, and what did
23 she say to you about these provisions?

24 A I don't recall in specific. In general, I
25 asked her about the EPA's willingness to agree to this

1 approach so that they would have additional time to
2 review provisions that we were working to incorporate. I
3 talked with her about the efficiency that that would gain
4 for the work we were doing on the permit and believed it
5 to be a reasonable solution.

6 Q Did you and Ms. Lotthammer discuss whether or
7 not the agreement was consistent with the memorandum of
8 agreement?

9 A I don't recall.

10 Q Did you and Ms. Lotthammer discuss whether or
11 not you could make this agreement without going through
12 the formal modification or amendment process provided for
13 in the memorandum of agreement?

14 A I don't recall.

15 Q Did you consult with anybody else about whether
16 this was a valid agreement in light of the amendment
17 modification provisions of the memorandum of agreement?

18 A I don't remember whether we invited the general
19 counsels' office of the agency to review this. That
20 would be the other person I would have thought to
21 consult, but I don't recall having done that or not
22 having done that.

23 Q Did you discuss the pre-proposed permit concept
24 with anyone other than Ms. Lotthammer?

25 A I don't recall.

1 Q Did you discuss this agreement that Mr. Thiede
2 outlined with anybody other than Ms. Lotthammer?

3 A Not to my recollection.

4 Q Did you report this agreement to
5 Governor Dayton or his chiefs of staff?

6 A It may have come up after the fact in
7 conversation with either the chief of staff, but not with
8 Governor Dayton.

9 Q In connection with the agreement that was made
10 with the EPA in Exhibit 64, did you discuss with any
11 person whether or not it was problematic in terms of the
12 administrative record that EPA's comments would not be in
13 writing during the public comment period?

14 A Sorry. I got lost after you said
15 "administrative record." Could I have the question read
16 back?

17 MR. PENTELOVITCH: Can we have the question
18 read back, your Honor?

19 THE COURT: Could you read it back, please?

20 THE COURT REPORTER: "In connection with the
21 agreement that was made with the EPA in Exhibit 64, did
22 you discuss with any person whether or not it was
23 problematic in terms of the administrative record that
24 EPA's comments would not be in writing during the public
25 comment period?"

1 THE WITNESS: I don't recall having a
2 conversation with anyone about that.

3 BY MR. PENTELOVITCH:

4 Q Do you recall having a concern about it
5 yourself?

6 A No, I don't recall having a concern. It was
7 part of a long, extensive, documented review of the
8 permit, and it was going to take a considerable amount of
9 additional time to review and amend or modify the
10 existing proposed permit. So I viewed it as a reasonable
11 way to incorporate EPA's concerns and consider it for
12 revision.

13 Q Did you know in March of 2018 that the
14 arrangement that had been agreed to in Exhibit 64 was
15 different than any arrangement that had ever -- different
16 than any interaction that had ever taken place between
17 PCA and EPA in the permitting process during your tenure?

18 A I don't recall having that concern.

19 Q Do you recall knowing it?

20 A In general terms, I knew it was an approach
21 that was specific to this permit for the sake of
22 efficiently communicating between EPA and PCA.

23 Q Are you aware of any similar situation in
24 connection with a permit that occurred during your
25 tenure?

1 A Similar in the sense that identical or similar
2 in the sense that we were --

3 Q Similar in that there was created a
4 intermediate step not provided for in the MOA and a time
5 period not provided for in the MOA given to EPA. Are you
6 familiar with any similar situation?

7 A I don't recall.

8 Q And if I would ask that same question about
9 whether you were aware of anything like that happening
10 prior to your tenure, what would your answer be?

11 A No, I'm not aware.

12 THE COURT: A question that I have generally
13 regarding all the documents that are being placed into my
14 record, will anyone be at any point telling me what of
15 the exhibits I ultimately receive are in the
16 administrative record and what isn't in the
17 administrative record?

18 MR. NELSON: Your Honor, Evan Nelson for
19 Relators.

20 We have agreed to attempt to come to a
21 stipulation as to the contents, and the attempts will be
22 ongoing. We don't have a stipulation right now.

23 THE COURT: Okay. Fantastic.

24 MR. MARTIN: And, your Honor, regardless of
25 whether or not we have a stipulation, we will endeavor to

1 do that.

2 THE COURT: Right. And if there is -- if you
3 can't agree what's in the administrative record, I would
4 view that as problematic for a number of reasons that I
5 think you can figure out. But we're putting together an
6 exhibit list, and maybe when we get done with our list of
7 received exhibits, I don't know if there's room on what
8 we're working with to create a little box that could be
9 X'ed if it's in the administrative record and be blank if
10 it's not. And we might be able to merge work at some
11 point.

12 Fair enough?

13 MR. NELSON: Understood, your Honor.

14 MR. MARTIN: Okay, your Honor.

15 THE COURT: We're working on that.

16 MR. PENTELOVITCH: Thank you.

17 BY MR. PENTELOVITCH:

18 Q I want you to look back at Exhibit 333 again.
19 Did you ever learn during your tenure as commissioner
20 that Ms. Lotthammer had deleted this email from her email
21 account?

22 A No.

23 Q Did Ms. Lotthammer ever discuss with you
24 whether or not she should delete this email from her
25 email account?

1 A Not to my recollection.

2 Q Has Ms. Lotthammer ever told you why she
3 deleted this email from her email account?

4 A Not to my recollection.

5 Q Do you have any knowledge as to why she would
6 have done that?

7 A I don't.

8 Q Are you aware of any instruction she was given
9 to delete it?

10 A No.

11 Q Do you know why she would have deleted
12 Exhibit 333 but saved Exhibit 60 -- I'm sorry.
13 Exhibit 64, why she would have saved 64 but not 333?

14 A I do not.

15 Q All right. Next exhibit is 307.

16 THE COURT: It's in evidence.

17 BY MR. PENTELOVITCH:

18 Q Showing you what's been marked -- or I'm sorry,
19 admitted into evidence as Exhibit 307, which is a
20 document that continues the email chain that we were just
21 looking at in Exhibit 64, but the top email is now from
22 Jeff Udd to Richard Clark with a copy to Stephanie
23 Handeland. And it doesn't appear from this that you were
24 at least an open copy recipient. Do you recall whether
25 you received Mr. Udd's email at the top of Exhibit 307?

1 A No, I don't.

2 Q In that email, Mr. Udd refers to a conversation
3 he had with Kevin Pierard. And in it, the second
4 sentence he's referring to wanting to have routine
5 check-in meetings. And he refers to Mr. Pierard saying,
6 quote, He would like to have one the first week of April
7 to walk through what the comment letter would have said
8 if it were sent, closed quote.

9 My question to you is, did you learn sometime
10 between March 16 and April 5 of 2018 that the EPA wanted
11 to read to PCA what the comment letter would have said if
12 it were sent?

13 A I don't recall.

14 Q Did you know that there was going to be a phone
15 call on April 5, 2018, between the EPA and the PCA?

16 A I don't recall.

17 Q Do you recall anyone ever reporting to you that
18 a phone call took place on April 5, 2018, in which the
19 EPA read its comment letter or portions thereof to the
20 PCA staff?

21 A I do recall a conversation, but I don't recall
22 if it was before or after the call actually occurred.

23 Q What do you recall about that conversation?

24 A I believe it was Ms. Lotthammer explaining to
25 me that this was the EPA's decision to convey their input

1 to the Agency and that that was -- was going to or had.
2 I just don't recall when it actually occurred, but that
3 it was the EPA's decision to make the comments in that
4 form.

5 Q During your tenure as commissioner of the MPCA,
6 do you recall any other occasion in which the EPA read a
7 comment letter to PCA over the phone but did not submit a
8 copy of the letter or its comments to the PCA?

9 A I don't recall, although I was never involved
10 directly in conversations between the staff on such
11 matters.

12 Q Are you aware of it ever occurring after
13 April 5, 2018, and prior to your departure from office?

14 A I don't recall.

15 Q Did you have any discussions with
16 Ms. Lotthammer or anyone else about how to preserve
17 within the PCA records the information conveyed to PCA by
18 EPA in that phone call where it read the comment letter?

19 A No. I don't recall having any conversation in
20 that form.

21 Q After the phone call occurred, did anyone
22 report to you on what the EPA had said during the
23 conversation?

24 A Not in specific terms. There may have been a
25 general description of what the conversation on the phone

1 included.

2 Q What do you recall of that general description?

3 A That there were comments made regarding permit
4 conditions, the form of treatment, and other matters that
5 were specific to the permit conditions.

6 Q Who reported that to you?

7 A To the best of my recollection, it would have
8 been Shannon Lotthammer and/or Mr. Udd, but I don't
9 recall a specific instance.

10 Q Do you recall any discussion with them as to
11 whether there should be a written record made of what the
12 PCA had said for the PCA record -- what EPA had said for
13 the PCA records?

14 A No. I considered that their discretion.

15 Q So you gave no instructions one way or the
16 other?

17 A That's correct.

18 Q And would it be fair to say you didn't know one
19 way or the other whether or not a written record was
20 made?

21 A That would be fair.

22 MR. PENTELOVITCH: The next exhibits are 348
23 and 349.

24 THE COURT: Not yet in evidence.

25 MR. PENTELOVITCH: You've got copies for the

1 witness? I've got copies for the Court.

2 MR. NELSON: This is 348.

3 THE WITNESS: Thank you.

4 MR. NELSON: This is 349.

5 THE WITNESS: Thank you.

6 MR. PENTELOVITCH: Before I give it to the
7 Judge, let me say what they are. Exhibit 348, for the
8 record, is the Final NPDES Permit Program Fact Sheet, and
9 Exhibit 349 is the Final Permit.

10 BY MR. PENTELOVITCH:

11 Q And the question I have for you, Mr. Stine, is,
12 is that your signature on Exhibit 349?

13 A Yes, it is.

14 Q And do you recognize Exhibits 348 and 349 as
15 the final permit and fact sheet for the PolyMet permit?

16 A Yes. To my knowledge, yes.

17 THE COURT: Hearing no objection, the two
18 exhibits are received.

19 MR. PENTELOVITCH: And with that, your Honor,
20 I'll pass the witness.

21 THE COURT: All right. I understand that, for
22 purposes of efficiency, that the PCA wants to do their
23 direct. Are there any other -- and will PolyMet also
24 want to do their questioning of this witness at this
25 time, I hope?

1 MR. MILLS: I may -- yes, your Honor, and may
2 only have a couple questions and maybe no questions.

3 THE COURT: Do you want to go last then?

4 MR. MILLS: Sure, happy to go last.

5 THE COURT: All right.

6 All right. So the stage is set. Mr. Martin,
7 you're up.

8 MR. MARTIN: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. MARTIN:

11 Q Good morning, Mr. Stine.

12 A Good morning.

13 Q Mr. Stine, why don't we begin with a little bit
14 about yourself. Where do you work?

15 A Today I work at Freshwater Society. I'm the
16 executive director.

17 Q And what is Freshwater Society?

18 A It's a Twin Cities-based non-profit
19 organization that promotes stewardship and conservation
20 of freshwater resources.

21 Q And would you mind giving us just a thumbnail
22 of what your education is?

23 A I was -- I grew up in Roseville, Minnesota. I
24 went to the University of Minnesota for my college
25 education on the St. Paul campus. I was educated in the

1 College of Agriculture at the time between 1976 and 1980,
2 received a bachelor of science degree in soil and water
3 resource management from the University of Minnesota in
4 1980. And that degree included both soil science and
5 hydrology as its primary focus but included additional
6 Earth science, ecology, biology, natural resources
7 management education.

8 Q And could you also just give us a thumbnail of
9 your work history beginning after college?

10 A So while I was in college, I began as a student
11 worker working at the Minnesota Department of Natural
12 Resources. In 1978, I worked two different student jobs
13 while in college for the DNR. In 1980, August of 1980, I
14 was hired as a hydrologist with the Department of Natural
15 Resources and worked in the regional office that covered
16 the Twin Cities Metropolitan Area. I was promoted in
17 1989 to be a regional hydrologist, which is a supervisor
18 of the group of hydrologists with whom I'd previously
19 worked. I worked in that capacity for four years roughly
20 as a regional hydrologist. Then I moved to the central
21 office in order to work on a special project but then was
22 appointed to a position as an administrator of the
23 section dealing with the rules and regulations for DNR
24 waters, permitting, and land use programs. I continued
25 in that capacity until 2004, when I moved on to an

1 assistant division director role in Trails and Waterways
2 Division and then left the DNR in 2005 to join the
3 Minnesota Department of Health as an assistant director
4 of the Environmental Health Division.

5 I worked at the Minnesota Department of Health
6 roughly six years. During that period of time, I was
7 promoted from the assistant director of Environmental
8 Health to be the director of Environmental Health and
9 subsequently to be an assistant commissioner for the
10 Health Protection Bureau at the Department of Health.

11 In 2009 through 2011, when I transferred, was
12 hired by the Minnesota Pollution Control Agency
13 Commissioner to serve as deputy commissioner, which I did
14 from March of 2011 until May of 2012 when Governor Dayton
15 appointed me to be the commissioner of the agency. And I
16 served in that capacity then until I left and the
17 Governor left office in January of 2019.

18 Q Let me interrupt you here, if you don't mind.
19 Mr. Stine, why did you take that job as commissioner of
20 MPCA?

21 A I was a career public servant. It was a great
22 honor and privilege having worked with hundreds of fellow
23 public servants to take the helm of an agency to be its
24 leader and to work on behalf of the public servants that
25 I was a part of for my entire career. It was a great

1 honor to me to begin my career as a student worker, to
2 end my career in public service at the highest level
3 attainable in civil service in the State of Minnesota. I
4 was proud of the people that I worked with and served,
5 and I remain that way today.

6 Q Mr. Stine, can you -- you obviously made many,
7 many decisions as commissioner of MPCA.

8 A Yes.

9 Q Can you say what principles guided your
10 decisions?

11 A First, integrity, sincerity to the rule of law,
12 following the law, following the regulations. Our job as
13 agency leaders was to fulfill and implement the statutory
14 requirements and the regulations that were duly
15 promulgated to implement them. Our job was to -- my job
16 was to ensure that people knew that that was the limits
17 of their authority and the requirements of their duties
18 to protect and to do our best to improve and restore our
19 natural resources of the State of Minnesota.

20 MR. MARTIN: Your Honor, this might be a good
21 time to take a break if it please the Court.

22 THE COURT: All right. We'll take our morning
23 break of 20 minutes.

24 (A recess was taken at 10:20 a.m. until 10:41 a.m.)

25 THE COURT: Remain seated.

1 Mr. Martin, you may resume.

2 MR. MARTIN: Thank you, your Honor. Your
3 Honor, we'll go directly to Exhibit 77.

4 THE COURT: Okay.

5 MR. MARTIN: And, your Honor, you may recall
6 that this was the subject of some discussion yesterday.
7 There was a question raised about a date at the bottom of
8 that document.

9 THE COURT: Yes.

10 MR. MARTIN: The date was October 2, 2019. We
11 have since looked into where this document came from.
12 And what it appears is that, at least for the most part,
13 this document was in Word form and then converted to a
14 PDF on October 2. The Word form document was October 16.
15 We won't object to this document, and we won't attempt to
16 substitute a different version of it.

17 THE COURT: So for purposes of this case,
18 Exhibit 77 was in effect for all material purposes.

19 MR. MARTIN: I think that's correct, your
20 Honor, yes.

21 THE COURT: Okay. We'll proceed on that basis.

22 MR. MARTIN: Thank you, your Honor.

23 BY MR. MARTIN:

24 Q Mr. Stine, I would like to talk about the
25 document that's marked for admission and has been

1 admitted as Exhibit 77, the title of that document being
2 Records and Data Management Manual. Do you have that
3 document?

4 A I do.

5 Q And you'll recall that yesterday
6 Mr. Pentelovitch was asking you questions about that
7 document. Do you recall that?

8 A Yes.

9 Q And he read excerpts of that document into the
10 record. Do you remember that?

11 A I do.

12 Q I would like to talk about some of the excerpts
13 from this document that may not have been read into the
14 record. I'll invite your attention to page 11 of that
15 document, if you will.

16 A Yes.

17 Q Do you see an entry next to a bullet that is
18 called "Notes"? Do you see that?

19 A Yes.

20 Q I'm going to read that paragraph into the
21 record. "Unless otherwise specified, notes that do not
22 qualify as personal papers can be destroyed/deleted once
23 they are incorporated into a final product. Examples
24 include notes used to prepare meeting minutes, records of
25 telephone conversations, decision memoranda or other

1 documents when the gist of the discussion, conversation,
2 direction or other activity is embodied in a document
3 that states the official agency decision, position or
4 outcome."

5 Did I read that correctly?

6 A Yes.

7 Q And was it your understanding that these are
8 what are termed "notes" by way of records management
9 when -- during your tenure as commissioner?

10 A Yes.

11 Q And I'll invite your attention to the first
12 paragraph under the term "Nonrecord," again on page 11 of
13 that document. That paragraph reads, "A 'nonrecord' is a
14 document created or received by the agency that does not
15 meet the definitions of any of the other listed record
16 types. It does not contribute to an understanding of the
17 agency's activities, business or decision-making
18 processes."

19 Did I read that correctly?

20 A You did.

21 Q And is it your understanding that that is the
22 definition of "nonrecord" during the period of time when
23 you were commissioner of MPCA?

24 A Generally, yes.

25 Q And then I'll invite your attention to the

1 table at the bottom of page 11. Do you see an entry in
2 the left-hand column in that table that's called
3 "Nonrecord"?

4 A Yes.

5 Q And the text next to "Nonrecord" reads as
6 follows: "Materials that do not meet the definition of a
7 record, usually not required to be retained."

8 Did I read that correctly?

9 A You did.

10 Q And is it your understanding that non-records
11 were not required to be retained during your tenure when
12 you were commissioner of MPCA?

13 A Yes.

14 Q I'll invite your attention to the next page.
15 First, at the top of that page, do you see the question
16 that reads as follows: "Is it a Record or a Nonrecord?"

17 Do you see that?

18 A I do.

19 Q And I'm going to invite your attention to
20 halfway down that page where the text reads, "If the
21 answer to any of the below-listed questions is 'yes,' the
22 document in question may be a nonrecord."

23 Did I read that correctly?

24 A Yes.

25 Q And going down to the first checked box beneath

1 that entry, it says, "Does the information consist of
2 development" -- excuse me -- "development materials such
3 as approaches to issues, drafts, notes, outlines,
4 preliminary calculations, et cetera, that you have used
5 when preparing documents for official agency action that
6 have been incorporated or summarized in a final product?"

7 Do you see that?

8 A Yes.

9 Q And in your experience, when you were the
10 commissioner of MPCA, when there were development
11 materials of that nature, were those considered to be
12 non-records that would not be required to be retained by
13 the agency?

14 A Yes. That's my understanding.

15 Q Let's go to some other documents that concern
16 records management. First let's go to Exhibit Number 76.

17 THE COURT: It's in evidence.

18 BY MR. MARTIN:

19 Q First, I'll invite your attention on Exhibit 76
20 to an entry on the first page beneath "Points to remember
21 about email."

22 Do you see that?

23 A I do.

24 Q And the sixth bullet down reads as follows:

25 "Delete messages that are not records when no longer

1 needed."

2 Did I read that correctly?

3 A Yes.

4 Q And was it your understanding that, during the
5 period of time when you were the commissioner of MPCA,
6 that emails that were non-records should be deleted when
7 no longer needed?

8 A Yes.

9 Q I'll invite your attention, Mr. Stine, to
10 page 3 of Exhibit 76. And there is an entry under the
11 title "What are records and non-records?"

12 Do you see that?

13 A I do.

14 Q And in the first full paragraph beneath the
15 bullets under that entry, there is text that reads as
16 follows: "Non-records include materials that do not
17 contribute to an understanding of MPCA operations or
18 decision-making processes, have no substantial
19 programmatic value or are copies of official record
20 documents retained elsewhere."

21 Do you see that entry?

22 A I do.

23 Q And is it your understanding that documents of
24 that description would be considered non-records by the
25 MPCA during the time when you were commissioner?

1 A Yes.

2 Q We'll move on to what's been marked for
3 identification as Exhibit 1003.

4 THE COURT: It's not in. Thank you.

5 Hearing no objection, it's received.

6 BY MR. MARTIN:

7 Q Mr. Stine, can you identify this document?
8 What is the title of it?

9 A The title of this document is Minnesota
10 Pollution Control Agency logo with "Data Practices Dos
11 and Don'ts."

12 Q And is this a document that was put out by the
13 MPCA?

14 A Yes.

15 Q And is it instructions regarding data practices
16 and retention of documents?

17 A Yes, generally.

18 Q And under the word "Do," would you read the
19 first entry of that document?

20 A "Keep your files neat and discard any drafts
21 and notes when you are through using them."

22 Q Thank you, Mr. Stine.

23 Let's move on to a document that has been
24 entered into evidence, Exhibit 71. And I think you have
25 that there at the witness stand.

1 A What's the document you're referring to?

2 Q Minnesota Records Retention Schedule.

3 A Yes, I have a copy.

4 Q And without going into the detail of this
5 document, is it your understanding that non-records would
6 not be included in a records retention schedule and
7 subject to that records retention schedule?

8 A That is my understanding.

9 Q And was that understanding the case during your
10 tenure as the commissioner of MPCA?

11 A Yes.

12 Q Mr. Stine, I would like to, if I can, talk to
13 you about -- first about EPA's role. Do you know whether
14 or not prior to the NorthMet permit EPA ever commented on
15 a permit outside the public comment period?

16 A I'm not aware of specifics, but I'm aware that
17 they had commented outside the public comment period on
18 permits, yes.

19 Q And does EPA usually comment on NPDES permits?

20 A Again, in specific instances, I'm not sure. I
21 know that they often do not comment during the public
22 comment period.

23 Q And let's turn our attention then to the
24 NorthMet permit, and let's actually begin at the end.
25 Who made the decision to approve the NorthMet permit?

1 A That was my decision.

2 Q Did Governor Dayton instruct you about the
3 NorthMet permit?

4 A No, he did not.

5 Q Did he say anything about that decision-making
6 process?

7 A During the course of my term as commissioner,
8 we had a number of conversations regarding my
9 responsibilities, in which he said to me repeatedly,
10 follow the law and your regulations; make the decisions
11 based on your best judgment.

12 Q And let me ask, on the NorthMet permit, when
13 did you make that decision?

14 A The morning of the day I signed the permit.

15 Q And why is it that you hadn't made the decision
16 prior to that?

17 A This project was extremely complex. There was
18 a wide range of public and organizational commentary.
19 The record was very thick with public input. There were
20 a number of factors I wanted to weigh until the very end
21 of the conversation. I was briefed multiple times by the
22 staff. I took input from a wide range of internal advice
23 before I made the decision, and so it was necessary that
24 I allow that process to be complete before I made the
25 decision.

1 Q And did you have any pre-disposal, or was there
2 any pre-determination of any sort?

3 A No. I recall stating to one of my staff,
4 probably my executive assistant, that I am staying on the
5 fence until the very end of this decision-making process.
6 So I was making it a 50/50 place, in my mind, to keep an
7 open mind to either option, issuing the permit or not
8 issuing the permit.

9 Q Can you describe the public involvement with
10 the NorthMet permit for the record?

11 A It was very extensive public involvement.
12 First of all, the environmental review that went along
13 with this project was a very long and extensive process.
14 There were -- it was a joint federal-state environmental
15 impact statement that was created that was part of the
16 background for the project's advancement to permitting
17 and permit application submissions. That took more than
18 ten years to complete. The public process that the
19 agency incorporated for public input included at least
20 two public information meetings in the northeast part of
21 the state. There were extensive articles and comments on
22 it in the media, and it was a very, very, thoroughly
23 debated and deliberated project, from my experience
24 within state government.

25 Q And were there changes made to the permit in

1 response to public comments?

2 A There were. The public comment period that's
3 been discussed resulted in hundreds of public comments --
4 thousands of public comments, hundreds of which were
5 deemed to be substantial or substantive and needed a
6 response in our record. So the staff were working
7 extremely hard to respond to all those comments. And
8 that did lead to modifications of the draft permit
9 provisions, which then were put forward in a future draft
10 of the permit by the agency.

11 Q And in terms of comparing this particular NPDES
12 to other NPDES permits, how does it compare?

13 A That is a much more extensive process than we
14 had -- than my understanding would have ever incorporated
15 into the sort of more run-of-the-mill NPDES permits such
16 as those that are considered for municipal wastewater
17 treatment facilities, the permits that are issued for
18 municipal storm sewer permits, and others that were under
19 the agency's jurisdiction. So this one was rather
20 substantial in its volume and documentation.

21 Q And let's talk for a moment about EPA's role in
22 NPDES permitting. Let me ask just a general question.
23 What is EPA's role in NPDES permitting?

24 A Well, EPA is responsible for the Clean Water
25 Act, and the permit program itself is some part of the

1 Clean Water Act. The Environmental Protection Agency
2 delegates programmatically the jurisdiction for NPDES
3 permits to states and state jurisdictions, and then their
4 role, once delegation has occurred, is to oversee and
5 assure the agency's work under the delegation agreement
6 as well as compliance with all the applicable laws and
7 rules that are part of the Federal Clean Water Act.

8 Q Let's talk process for a moment. Does EPA have
9 the capacity to comment on a discharge permit?

10 A Yes, they do.

11 Q And does EPA have the capacity to object to a
12 discharge permit?

13 A Yes, they do.

14 Q And does EPA have the authority to veto a
15 permit?

16 A They do.

17 Q In your understanding, could MPCA ever prevent
18 EPA from commenting on a permit?

19 A No. That would not be possible, much less
20 likely, in my opinion.

21 Q Why do you say that?

22 A The EPA has the authority under the existing
23 programmatic agreement. They have -- as I mentioned
24 earlier, the agency works with the EPA on thousands of
25 different kinds of permitted projects. First of all, it

1 would be highly unusual and unlikely for the agency, for
2 the EPA to renege on their authority or to not follow
3 their own requirements. That's their responsibility
4 under the federal law. There is checks and balances and
5 various public review processes. There are the elected
6 officials that watch this program very closely at the
7 national level and at the state level. It's just
8 highly -- there would be no way, in my opinion, for the
9 EPA to avoid the responsibility to review and comment on,
10 approve, not approve, or remain silent on a permit.

11 Q Okay. And with respect to objecting to a
12 permit, could MPCA direct EPA not to object to a permit?

13 A No, that would not be within the state's
14 authority.

15 Q And could EPA direct -- excuse me. Could PCA
16 direct EPA not to veto a permit?

17 A No. Again, that would be outside the state's
18 authority.

19 Q Are you aware of any instance where someone
20 from MPCA ever attempted to direct EPA not to comment on
21 a permit?

22 A No.

23 Q Ever familiar with any time that someone from
24 MPCA directed EPA not to object to a permit?

25 A No.

1 Q Are you aware of any instance where anybody
2 from PCA ever directed EPA not to veto a permit?

3 A No, I'm not.

4 Q We've had conversations earlier in your
5 testimony about the memorandum of understanding. I'll
6 call it the MOA. And that is Exhibit Number 28. Do you
7 recall those discussions that you've had with opposing
8 counsel?

9 A Yes.

10 Q And what does that MOA govern, if you know?

11 A The MOA governs the delegated program for NPDES
12 permitting by the EPA to the State of Minnesota and its
13 Pollution Control Agency.

14 Q And let's go back to some discussions that you
15 had with the opposing counsel. There were questions
16 about the EPA regional administrator. And first, who is
17 the -- who was the regional administrator during your
18 tenure, if you remember?

19 A During my tenure, there were several EPA
20 administrators. But during the term that we've been
21 discussing in this hearing, it was Cathy Stepp.

22 Q And was that Ms. Stepp's first job in the field
23 of public environmental regulation?

24 A No. She had previously served as a secretary
25 of the Wisconsin DNR.

1 Q And do you have any idea for what duration she
2 was in that position?

3 A I don't, although I recall she served under
4 Governor Walker, and at least -- I believe it was at
5 least four years that she served under Governor Walker as
6 the secretary of the Wisconsin DNR.

7 Q Okay. And when she was secretary of Wisconsin
8 DNR, did she have occasion to interact with Region 5?

9 A Yeah, she --

10 MR. PENTELOVITCH: Objection, foundation.

11 THE COURT: Sustained.

12 BY MR. MARTIN:

13 Q Okay. Would -- Mr. Stine, are you familiar
14 with Ms. Stepp from when she was with Wisconsin DNR?

15 A Yes, I am.

16 Q And how did you know her?

17 A We had occasion to work together on a couple of
18 areas. One was when we were promoting the total maximum
19 daily load release for the St. Croix River. And we met
20 personally and were on a boat on the river to talk about
21 what total maximum daily loads for the St. Croix River
22 would mean. We also saw each other at semi-annual
23 meetings that were convened in Region 5's offices.
24 Region 5 would call together the state environmental
25 program directors, secretaries, commissioners, directors,

1 depending on the state, within Region 5, and we would
2 meet in Region 5 offices. And Ms. Stepp was at some of
3 those meetings.

4 Q And would you have any familiarity with how it
5 is that a director of a water program in another state
6 would interact with EPA Region 5?

7 MR. PENTELOVITCH: Objection, foundation.

8 MR. MARTIN: I'm --

9 THE COURT: That's a foundational question, so
10 the objection is overruled.

11 THE WITNESS: Only in general, that there is a
12 similar or a delegated program agreement for the Clean
13 Water Act in another state similar to the one that exists
14 in Minnesota. But not in specific, I wouldn't know how
15 their interactions occurred.

16 BY MR. MARTIN:

17 Q You know, though, don't you, that there would
18 be regular interaction between another state director and
19 the EPA Region 5?

20 MR. PENTELOVITCH: Objection, foundation.

21 THE COURT: That's sustained.

22 You knew, too.

23 MR. MARTIN: I actually thought I was going to
24 hear something else.

25 BY MR. MARTIN:

1 Q So anyway, let's go back to the question.
2 You're familiar with Ms. Stepp. Is that correct?

3 A That is correct.

4 Q You knew her prior to the time that she assumed
5 the position as the regional administrator, didn't you?

6 A Yes.

7 Q Would you say that Ms. Stepp had some
8 experience in environmental regulation prior to becoming
9 the Region 5 regional administrator?

10 A Yes. Her direct experience as a secretary of
11 the Wisconsin DNR would have been directly relevant to
12 the role.

13 Q Let's go to Mr. Thiede. Had you met Mr. Thiede
14 prior to the time that he worked for EPA Region 5?

15 A I believe I met Mr. Thiede at one EPA Region 5
16 directors meeting where he either attended with Ms. Stepp
17 or was her substitute for the State of Wisconsin at that
18 meeting.

19 Q And do you know in general what his position
20 was prior to the time that he became chief of staff for
21 the regional administrator at EPA Region 5?

22 A Yes. My understanding is he was in high level
23 management with the Wisconsin DNR, either its deputy,
24 secretary, or at another level such as chief of staff.

25 Q And do you know for what duration he occupied

1 those positions?

2 A I don't.

3 Q Okay. Let's go to the interaction between EPA
4 and PCA. First, in general, can you describe for the
5 Court the interaction between PCA and EPA on the NorthMet
6 permit?

7 A The interaction between the staff of our
8 permitting program and the mining sector staff and EPA
9 staff was frequent. So there was regular conversation.
10 I'm aware that they had extensive conference calls in
11 which they explored issues and ideas around the permit
12 itself. They also exchanged updates on work that was
13 being done to evaluate environmental issues, both water
14 related, air quality related, as well as solid waste. So
15 there were -- there was extensive conversation over the
16 entire course of the permit application and review
17 process, including and up to the public comment period
18 until the draft permit was -- the proposed permit was
19 submitted to EPA for their final review.

20 Q And how would that level of interaction with
21 EPA compare to the interaction on other permits?

22 MR. PENTELOVITCH: Objection, foundation.

23 THE COURT: Overruled.

24 THE WITNESS: My understanding is that it was
25 far more extensive than would have occurred on other

1 kinds of NPDES permits.

2 BY MR. MARTIN:

3 Q And why was it that PCA engaged in that
4 extensive interaction?

5 A In the conversations I had with the staff, it
6 was to develop and understand the concerns that were
7 going to be communicated by the EPA, also, because it was
8 the most efficient way to convey and conduct the business
9 of the agency, was to remain in very close contact and
10 communication with them about the substance of our review
11 and their perspective on it so that when we got to a
12 point of drafting a permit, we were mutually aware of the
13 kinds of information that were going to be created or
14 drafted in the permit. Again, that was -- my concern was
15 that we make efficient use of our resources.

16 Q And do you think you did in fact make efficient
17 use of PCA's resources and EPA's resources, for that
18 matter?

19 A I can't speak for EPA. For the sake of the
20 Pollution Control Agency, given the extensive public
21 comment on this project as well as the fact that it was a
22 project that had never been brought to a permit decision
23 point, yes, I think we were extremely efficient and
24 effective at bringing the matter to a draft permit stage.

25 Q And just so the Court understands the nature of

1 this interaction, were there regular telephone
2 conferences between EPA and PCA?

3 A I'm aware from conversations I had with staff
4 over the term of the review of this project that there
5 was regular conference calls. They also had individual
6 calls and email exchanges about specific information that
7 occurred during the review period.

8 Q Okay. And what about face-to-face meetings?
9 Were there face-to-face meetings?

10 A I know there were some video conferences. I'm
11 unsure if there were face-to-face meetings about this
12 between the staff of the EPA and the MPCA.

13 Q Did you ever have occasion to speak with EPA
14 about the timing of EPA's comments on the NorthMet
15 permit?

16 A Yes. The specific conversation that I had was
17 on March 12 of 2018.

18 Q And can you describe that conversation for the
19 Court?

20 A Again, it was -- the conversation --

21 Q Let me digress for just a moment. Who was the
22 conversation with?

23 A Thank you. I had the conversation with
24 Cathy Stepp and Kurt Thiede.

25 Q And before we get into the substance of that

1 conversation, what prompted the conversation?

2 A At the time, we were in the public comment
3 period, and there was extensive work by the staff. The
4 staff were really deluged by the response requirements of
5 responding to hundreds of public comments. I was
6 concerned after discussing that workload and the demands
7 on our staff that we could find the most efficient way to
8 respond.

9 The second point that was relevant to that
10 phone conversation was that we were in the midst of a
11 legislative session, and the Speaker of the House of
12 Representatives and a member of the House of
13 Representatives had contacted Ms. Stepp with questions
14 that were -- that she wanted to hear my perspective on.

15 Q And those questions, were they related to the
16 NorthMet permit?

17 A They were related to the water quality standard
18 for wild rice.

19 Q Okay. Let's move to Exhibit 1133.

20 THE COURT: Hearing no objection, 1133 is
21 received.

22 MR. MARTIN: And I'm not going to go into great
23 detail about this. But Document --

24 THE COURT: You're not going to read every
25 page?

1 MR. MARTIN: I thought we would weigh it first.

2 BY MR. MARTIN:

3 Q Can you identify for the record what
4 Exhibit 1133 is?

5 A This is a highlighted version of a spreadsheet
6 that is the "PolyMet NPDES/SDS Permit - Response to
7 Comments" comprising about 304 items, it looks like.

8 Q Well, let's -- and about how many pages does it
9 comprise, if you know?

10 A Well, it's not paginated, but it looks to be
11 hundreds.

12 Q Okay. Was this response to comments, was that
13 something that your staff prepared?

14 A Yes.

15 Q And when did they prepare it, roughly?

16 A They were working on this as comments were
17 submitted. During the review process and following the
18 public -- during the public notice period, as comments
19 were made, the staff would begin developing responses.
20 And then it was completed subsequent to the public notice
21 period once all the public comments were assembled and
22 completed.

23 Q And can you describe the burden on your staff
24 from preparing the response to comments?

25 A It was a dramatic amount of work. There were a

1 number of staff working on it, and this was very
2 extensive amount of workload for the staff.

3 Q And who actually contributed to the preparation
4 of the response to comments?

5 A This would have been a number of our staff.
6 I'm not specifically aware of the names and the titles of
7 the staff that contributed to this, but it would have
8 been our permit review staff as well as staff within our
9 program that were supporting them from the mining sector.

10 Q And did preparation of this document strain the
11 resources of MPCA?

12 A Yes. It was extremely extensive and a burden
13 but necessary for us to complete.

14 Q Okay. And let's go to the permit and attendant
15 documents. Let's go to Exhibit Number 1118.

16 MR. MARTIN: I don't believe your Honor has
17 that yet.

18 THE COURT: Final permit? No.

19 MR. MARTIN: You can have this one if you'd
20 like. And again, we don't intend to go into a lot of
21 detail about this document.

22 THE COURT: Exhibit 1118, hearing --

23 MR. PENTELOVITCH: I have to look at it before
24 you do that.

25 No objection.

1 THE COURT: It's received.

2 BY MR. MARTIN:

3 Q And Exhibit 1118, Mr. Stine, can you identify
4 that document for the record?

5 A This is the final NPDES/SDS Permit and Findings
6 of Fact for the PolyMet project.

7 Q And, obviously, the attendant documents. Is
8 that correct?

9 A Yes.

10 Q Okay. Getting past that preliminary matter,
11 who prepared that permit and the attendant documents?

12 A This was prepared by the staff of the agency.

13 Q And was that an additional -- in addition to
14 responding to the comments for your staff?

15 A Yes. It's an extremely -- the findings of fact
16 and the documents associated with this very thick
17 document was a burden for our staff.

18 Q And again, did it strain the resources of MPCA?

19 A It did. And it was necessary for us to have
20 consultation between various supervisors and managers
21 about how they might contribute to supporting the work
22 activities of the unit that was preparing the response.
23 I recall one conversation in which division directors
24 were talking about who would be available to support the
25 work.

1 Q And can you describe that conversation?

2 A There was a need --

3 MR. PENTELOVITCH: Objection, hearsay.

4 THE COURT: Just a moment.

5 MR. MARTIN: Your Honor, we're not offering it
6 for proof of the matter asserted therein.

7 THE COURT: The purpose is?

8 MR. MARTIN: The purpose is that he was on
9 notice, that this was very burdensome to his staff.

10 MR. PENTELOVITCH: Your Honor, they're not even
11 identifying the name of the person he's referring to,
12 so --

13 MR. MARTIN: We can do that.

14 THE COURT: Okay. Withdraw the question.
15 Start over.

16 BY MR. MARTIN:

17 Q Who was in that meeting, Mr. Stine?

18 A This would have been a meeting among our senior
19 managers and division directors. It would have been --
20 my recollection was Jeff Smith of the Industrial Division
21 as well as the director of Environmental Analysis and
22 Outcomes at the time would have been Todd Biewen,
23 B-i-e-w-e-n, I believe.

24 Q And did you in that meeting discuss the burden
25 on the respective staffs who were represented in the

1 meeting?

2 A Yes. The conversation was regarding would
3 there be additional staff that could support responding
4 to the comments, meaning could there be staff from other
5 divisions, from the other Division of Environmental
6 Analysis and Outcomes that could assist the Industrial
7 Division in preparing the comments -- response to
8 comments.

9 Q Okay. And with that background, let me ask at
10 the risk of repetition, so what is it that prompted you
11 to talk to regional administrative staff?

12 A I was concerned about the workload and getting
13 the work done in the most effective way, most efficient
14 way that we could. And visiting with the regional
15 administrator, Cathy Stepp, I expressed to her my desire
16 that the staff were deep in the work activity of
17 responding to the comments that were submitted and that
18 the permit that we were in the midst of revising would be
19 more efficiently reviewed by her team if we could provide
20 it to them after the comments were incorporated and
21 modifications made to the draft permit.

22 Q And why do you say that's more efficient?

23 A Well, it's always more efficient to review
24 something in a form that's more current. And so if there
25 were provisions that EPA staff were concerned about,

1 there were likely changes that were being made to that
2 section of the permit based on our review of the comments
3 and our own technical position. So had they commented
4 in -- multiple times, for example, during -- prior to the
5 revision of the permit, those comments might have been
6 moot by the time that the revised draft permit was made.
7 And so for efficiency sake, it was most important to me
8 to make sure they knew what we were expecting to change
9 and how that would directly impact their interest in
10 comments.

11 Q And what was Ms. Stepp's reaction to this
12 suggestion?

13 A She said she would take it under advisement.
14 She said that she would discuss the matter with her team
15 and that she would likely delegate the response to this
16 idea to Kurt Thiede, the chief of staff.

17 Q And in that conversation and in the ensuing
18 actions you took, were you attempting to cover up or
19 prevent criticisms from EPA?

20 A No.

21 Q So what happened after that, if you recall, on
22 this subject?

23 A As I recall from previous exhibits that were
24 shown here, I followed up the same day of the
25 conversation with Ms. Stepp and Mr. Thiede and -- because

1 there was a question about which agreement we were
2 talking about, and I sent an email to her thanking them
3 for the conversation and acknowledging that Shannon
4 Lotthammer on my team, the assistant commissioner from
5 Water Policy, would be the person who would follow up.
6 So the point of that was to make sure they knew who they
7 would be communicating with subsequently.

8 Q And did you subsequently meet with
9 Ms. Lotthammer?

10 A I mentioned to her that we had had this
11 conversation and that I was going to then send an email.
12 And I explained to her what the conversation was about
13 and why I was concerned about the workload and efficiency
14 and asked her to look into the matter and see what could
15 be done about it.

16 Q And did you suggest to Ms. Lotthammer that EPA
17 comments should be suppressed or prevented?

18 A No.

19 Q So was your -- can you describe your
20 instruction to Ms. Lotthammer?

21 A My instruction was to let her know what the
22 conversation that I had had with Ms. Stepp and Mr. Thiede
23 and I had asked her to follow up with Mr. Thiede or
24 Ms. Stepp, whomever was delegated, although Cathy Stepp
25 had told me that she would likely hand the matter to

1 Mr. Thiede for follow-up. So my instruction to her was
2 to connect with Mr. Thiede.

3 Q And did you subsequently hear the results of a
4 connection between Ms. Lotthammer and Mr. Thiede?

5 A Generally speaking, yes, I was aware that they
6 had connected. I don't recall the follow-up about how
7 they were handling the matter.

8 Q And let's go to a document that's been marked
9 for identification as Exhibit 64. And I think you have
10 it up there. Can I give you a hand with that? Have you
11 got it? Okay. Let's take that.

12 A I'll move the world's largest ring binder to
13 the side here.

14 THE COURT: Me, too. I found mine, so...

15 MR. MARTIN: I'll do the weightlifting here.
16 Bear with me for a second. I'll get that out of your
17 way.

18 TRIAL TECH SUPPORT: I have another copy of
19 that if you want that one.

20 THE WITNESS: Thank you.

21 BY MR. MARTIN:

22 Q Mr. Stine, I would like, if you don't mind, if
23 you could review Exhibit 64 again. I think your
24 testimony this morning is that you had seen that document
25 before. Is that right?

1 A Yes.

2 Q And I say document. I should say it was an
3 email at that point in time.

4 A That's correct. That was copied by
5 Ms. Lotthammer on the exchange that she was having
6 between herself and Mr. Thiede.

7 Q And is this document an agreement between EPA
8 and PCA?

9 A It characterizes the agreement that was made by
10 EPA and PCA staff, I assume that means Mr. Thiede and
11 Ms. Lotthammer, regarding submittal of comments.

12 Q Okay. And let's get an express understanding
13 of what that agreement was.

14 I'm going to read the first sentence of the
15 second paragraph, and that would be on page 2 of
16 Exhibit 64, into the record. It reads as follows:

17 "Once MPCA completes their response to public
18 comments, it will develop a pre-proposed permit (PPP) and
19 provide the PPP to EPA Region 5."

20 Did I read that correctly?

21 A Yes.

22 Q And tell me what that would have entailed.
23 What did that mean to you?

24 A That meant that we would have incorporated the
25 most current agency response to comments and conditions

1 on the permit and that it would be a revision to the
2 draft permit that we would then provide to EPA Region 5
3 for their review.

4 Q And let's go to the next sentence.

5 "Region 5 EPA will have up to 45 days to review
6 the PPP and MPCA's responses to public comments and
7 provide written comments on the PPP to MPCA."

8 Did I read that correctly?

9 MR. SCHWARTZ: You did.

10 BY MR. MARTIN:

11 Q And why did you have -- why did EPA include
12 that provision in the text of this email, if you know?

13 MR. PENTELOVITCH: Objection, foundation, calls
14 for speculation.

15 MR. MARTIN: I think it's well founded.

16 THE COURT: Overruled. The question
17 incorporates the concerns raised.

18 If you know.

19 THE WITNESS: My understanding of that
20 additional 45-day provision was to allow EPA the
21 opportunity to submit thorough -- any comments they wish
22 prior to preparing the draft permit or the proposed
23 permit, that they would then have a 15-day period to
24 comment on before or object to or generally comment on.

25 BY MR. MARTIN:

1 Q And it was --

2 MR. PENTELOVITCH: Object. That's
3 non-responsive to the question that was asked.

4 MR. MARTIN: Well, we could --

5 THE COURT: Just a second.

6 Overruled.

7 BY MR. MARTIN:

8 Q In any of the conversations you had with EPA
9 representatives, did anyone suggest that this was not in
10 compliance with the memorandum of agreement?

11 A Not to my recollection, no.

12 Q And did anyone at PCA believe that this was not
13 in compliance with the MOA?

14 MR. PENTELOVITCH: Objection, calls for
15 speculation to another state of mind.

16 THE COURT: Sustained as the question is
17 phrased.

18 BY MR. MARTIN:

19 Q Well, let's start with your own view. Did you
20 view this as a violation of the MOA?

21 A I did not view it as a violation. I viewed it
22 as a solution to address my concerns over the efficiency
23 of getting our work done on the draft permit.

24 Q And did anyone else express to you a concern
25 about whether or not this agreement was in compliance

1 with the MOA?

2 A Not to my recollection, no.

3 Q The next sentence reads, "This would occur
4 prior to MPCA submitting a proposed permit to EPA, which,
5 according to the current MOA, would continue to give EPA
6 15 days to comment upon, generally object to, or make
7 recommendations with respect to the proposed permit."

8 Do you see that sentence?

9 A I do.

10 Q And this was text that, I gather, you received
11 from EPA. Is that correct?

12 A This was in the response email -- or an email
13 from Mr. Thiede to Shannon. So this sentence was written
14 by EPA Chief of Staff for Region 5 Kurt Thiede.

15 Q Let's go to the next sentence. "In accordance
16 with the current MOA and as specified in CWA Section
17 402(d)(2)(B) and 40 C.F.R. 123.44(b)(2), EPA still may
18 raise objections within the 90-day period from receipt of
19 the 'final' proposed permit."

20 And I'll stop there. Does that accord with
21 your understanding of the agreement between PCA and EPA?

22 A Yes.

23 Q I'm going to read the next phrase into the
24 record as well; "but we are hopeful our discussions and
25 the additional review will allow us to come to an

1 agreement and avoid objections."

2 Q Did I read that correctly?

3 A You did.

4 Q And what is the import of that language to you?

5 A From my perspective, this indicated that the
6 EPA was interested in making an efficient use of time to
7 come to understanding what the final permit would be and,
8 as stated specifically at the end of that sentence, avoid
9 objections to the permit.

10 Q Let's go to the next sentence. "It is our hope
11 and intent to continue a dialogue between MPCA staff and
12 R5 EPA WD staff prior to receipt of the PPP and during
13 EPA's review of the PPP as we work toward a NPDES permit
14 that both parties can support."

15 Q Let's -- did I read that correctly?

16 A You did.

17 Q And let's go back and discuss alphabet soup
18 here. "R5," is that Region 5?

19 A Yes.

20 Q And "WD," is that Water Division?

21 A Yes.

22 Q "PPP"?

23 A Pre-proposed permit.

24 Q And "NPDES" for the record.

25 A National Pollution Discharge Elimination

1 System.

2 Q Okay. First question, did the dialogue between
3 EPA and PCA continue after this agreement?

4 A To my recollection, yes, it did.

5 Q And it was a continued discussion of the
6 NorthMet permit. Is that right?

7 A Yes.

8 Q Next sentence, "in fact, I would like to
9 suggest setting up a face-to-face meeting when
10 appropriate to discuss the draft permit and EPA
11 observations."

12 Did I read that correctly?

13 A You did.

14 Q And was there in fact a face-to-face meeting
15 that was set up between EPA and PCA?

16 A I believe there was a conference call or a
17 videoconference. I do not recall if there was a
18 face-to-face meeting of staff and -- staff of the PCA and
19 EPA. So it's -- I don't recall if and when that
20 occurred.

21 Q And let's -- let me read the last sentence of
22 that paragraph into the record as well. "It is also our
23 intent to turn around our review and comments on the PPP
24 as soon as possible."

25 Did I read that correctly?

1 A You did.

2 Q And based on that sentence, what, if any,
3 expectation did you have about whether EPA would comment
4 on the NorthMet permit?

5 A The expectation I had and I have as of
6 reviewing it is that they were planning to make comments.

7 Q Before I get into further questions about this,
8 do you know if this document appears in the
9 administrative record for the NorthMet permit?

10 A I haven't -- I don't have specific knowledge of
11 whether this is in the administrative record of the
12 permit itself.

13 Q Okay. And let me just say for the record, your
14 Honor, I think both Relators and PCA agree that this is
15 in the administrative record.

16 THE COURT: Does such an agreement exist at
17 this time?

18 MS. MACCABEE: Pardon?

19 MR. NELSON: Your Honor, I think we need to
20 reserve our right to review that.

21 THE COURT: Okay. Open question. We'll figure
22 it out.

23 MR. MARTIN: You might want to check footnote 3
24 of your pretrial brief.

25 MR. NELSON: We'll double-check.

1 BY MR. MARTIN:

2 Q Let's conclude our conversation here with
3 just a few summary questions. As you sit here today,
4 based on your recollection of your time at PCA and the
5 NorthMet permit activities, are you aware of any effort
6 from any MPCA employee to hide EPA's concerns from the
7 public?

8 A No, I am not.

9 Q Did you ever request that EPA not comment on
10 the PolyMet permit?

11 A No, I did not.

12 Q Are you aware of any attempt by any MPCA
13 employee to cover up concerns that EPA had?

14 A No, I am not.

15 Q If you were aware of such attempts, what would
16 your reaction have been as commissioner of PCA?

17 A Such a matter would have required some
18 investigation and potentially some disciplinary action
19 if there was some kind of ethics -- code of ethics or
20 programmatic violation.

21 MR. MARTIN: Thank you, Mr. Stine.

22 I'll pass the witness.

23 THE COURT: PolyMet?

24 MR. MILLS: Yes, your Honor, I have.

25 THE COURT: All right. We have a spot for you.

CROSS-EXAMINATION

1
2 BY MR. MILLS:

3 Q Good morning, Mr. Stine. Monte Mills for
4 PolyMet.

5 A Good morning.

6 Q In your experience working in state government,
7 have you ever seen opponents to a project complain about
8 extra, additional processes for review of a permit for a
9 project other than PolyMet?

10 A I have heard from opponents of projects that --
11 there's complaints about several projects where why do
12 you have to go through all these extra hoops, for
13 example, why don't you just say no. So I have heard
14 opponents complain about that on some permitting levels.

15 Q In your experience, have you ever seen
16 opponents to a project complain about additional time for
17 reviewing a permit for the project?

18 A Generally speaking, opponents -- there are two
19 different camps. One is opponents tend to think that
20 more time is valuable because it provides more
21 opportunities for comments to be made or for information
22 to be gathered or for their perspective to be clarified.
23 So oftentimes, opponents are interested in having more
24 time.

25 MR. MILLS: Thank you. I have no further

1 questions at this time.

2 THE COURT: Any recross?

3 MR. PENTELOVITCH: Oh, yeah.

4 RECROSS-EXAMINATION

5 BY MR. PENTELOVITCH:

6 Q Good morning, again, Mr. Stine.

7 Could you look at Exhibit 64, please?

8 A Yes.

9 Q Would you point out in Exhibit 64 where it says
10 that the MPCA had asked EPA not to file written comments
11 during the public comment period?

12 A I don't see it in this.

13 Q Right. There is nothing in Exhibit 64 which
14 ties EPA not filing comments during the public comment
15 period to the agreement that is reflected in Exhibit 64,
16 correct?

17 A It's not referenced in this document.

18 Q Now, you testified that, in your opinion, this
19 was not a violation of the MOA. When did you form that
20 opinion and after discussion with whom?

21 A I think my response was I didn't -- I didn't
22 perceive it to be a violation, so I wouldn't have even --
23 I don't have specific recollection of when I arrived at
24 that conclusion, but it wasn't something that was
25 considered a significant procedural misstep at the time

1 that we were having this conversation. So around the
2 mid -- middle of March of 2018.

3 Q Did you actually go read the MOA in March of
4 2018?

5 A No, I don't recall doing that.

6 Q Did you do it in February 2018?

7 A No.

8 Q Did you do it any time up to the time you
9 signed the permit?

10 A I don't recall.

11 Q Take in hand Exhibit 1133, if you would.
12 That's the response to comments.

13 Now, this is the spreadsheet with the comments
14 and the responses, correct?

15 A Yes.

16 Q And the second column from the left says
17 "Commentor Name." Is that right?

18 A Yes.

19 Q And then there are comments that are numbered
20 all the way up through, it looks like, 684, correct?

21 A Yes.

22 Q And not one of those comments is from the EPA.
23 Isn't that true?

24 A I haven't reviewed the document in detail, so I
25 don't know.

1 Q Did you ever review this document?

2 A No, other than I asked the staff about the
3 response to comments and was it complete.

4 Q So you don't know if any EPA comments are
5 included in those 684 comments and the responses,
6 correct?

7 A As I sit here today, no.

8 MR. PENTELOVITCH: Okay. Are all the exhibits
9 from yesterday up there as well?

10 THE COURT: I have all the official court
11 exhibits right next to me.

12 BY MR. PENTELOVITCH:

13 Q Okay. Well, I'm going to show you --

14 MR. PENTELOVITCH: Perhaps, your Honor, if we
15 could show the witness -- if you could show him 837,
16 your Honor.

17 THE COURT: You're going to have to direct him
18 to the page, because only part of it was received.

19 BY MR. PENTELOVITCH:

20 Q Yes, if you could turn to page 27, please.

21 MR. MARTIN: Your Honor, if I may, I would like
22 to interject an objection, and I just want to interject
23 this early, that if we get into the responses, the
24 detailed responses, the substance of that, then it's
25 beyond the scope. And I would like to register a

1 continuing objection should this examination go that
2 direction.

3 MR. PENTELOVITCH: And I object to a speaking
4 objection, your Honor.

5 THE COURT: I object to objections made before
6 there's something to object to.

7 MR. MARTIN: Fair enough.

8 THE COURT: I have it on good authority that
9 when I conduct a hearing, someone might object at some
10 point, so I don't need to be warned that one is coming.

11 BY MR. PENTELOVITCH:

12 Q Do you have page 27 in front of you, Mr. Stine?

13 A Yes.

14 Q The record will reflect that pages 27, 28, and
15 29 of Exhibit 837 are typewritten versions of notes that
16 a Mr. Schmidt made of the April 5, 2018 telephone call
17 between the EPA and PCA. And my question to you is, have
18 you seen Mr. Schmidt's notes before?

19 A No.

20 Q Did you see them before you signed the permit?

21 A In specific, I don't recall seeing them.

22 Q Did you know these notes existed in typewritten
23 form before you signed the permit?

24 A I don't recall.

25 Q Did you make any effort to determine whether

1 the concerns of the EPA reflected on pages 27, 28, and 29
2 had been addressed in the permit?

3 A Only to the extent that when I was briefed by
4 the staff about any EPA concerns that were offered
5 relative to the draft permit, I asked if they had been
6 addressed in the final draft permit to our satisfaction.

7 Q And what were you told?

8 A I was told that they had been addressed.

9 Q If you could look at the 26 items that
10 Mr. Schmidt has listed there, can you tell me whether you
11 know personally one way or another whether these were
12 addressed in the permit?

13 MR. MARTIN: Objection, beyond the scope.

14 THE COURT: Overruled.

15 THE WITNESS: I would repeat my previous
16 answer. Only to the extent that I asked if the items
17 identified by EPA had been addressed by the agency in the
18 proposed permit. And the answer to that was they had.

19 BY MR. PENTELOVITCH:

20 Q Now, there was no deadline for when this permit
21 had to be issued, correct?

22 A Correct.

23 Q It could have gone on beyond your tenure as
24 MPCA commissioner, correct?

25 A Yes.

1 Q So MPCA was under no deadline in March of 2018
2 by which it had to get the comments reviewed, any revised
3 permit done, and a permit issued. Isn't that true?

4 A Generally, yes.

5 Q Now, you talked about efficiency and your
6 concerns about efficiency. And is it your --

7 THE COURT: Hold on, hold on. The document I
8 gave you --

9 THE WITNESS: Oh, thank you.

10 THE COURT: -- I need it back. I'm very
11 possessive.

12 THE WITNESS: Sorry, your Honor.

13 THE COURT: Go ahead. I'm sorry.

14 MR. PENTELOVITCH: That's a good quality.

15 THE COURT: I once had a case reversed because
16 the received exhibit was in my file at the office and
17 wasn't available for the reviewing court. It was a
18 wonderful experience.

19 Go ahead.

20 MR. PENTELOVITCH: We all have war stories.

21 THE COURT: That was as a lawyer, not a judge.

22 BY MR. PENTELOVITCH:

23 Q Exhibit 64 created a new layer of work called a
24 pre-proposed permit that was not contemplated in the MOA,
25 correct?

1 A A pre-proposed permit is not addressed
2 specifically, to my knowledge. The term is not
3 specifically addressed in the MOA.

4 Q It was something MPCA had never done before?
5 You testified to that earlier today.

6 A To my knowledge, that's correct.

7 Q Right. And it creates this 45-day review
8 period -- of that pre-proposed period for the
9 pre-proposed permit by the EPA that's also not in the
10 memorandum of agreement and it also is not something that
11 MPCA had ever done before, right?

12 A Yes. And that was my understanding was EPA's
13 proposal.

14 Q So your view in March of 2018 -- I want to make
15 sure I understand this -- is that it would be more
16 efficient for the PCA to take into account all public
17 comments but not written comments from the EPA, draft a
18 new version of the permit, then have the EPA comment on
19 that permit and risk having to redraft the permit again
20 because the EPA didn't like what you did, and you thought
21 that would be more efficient than just getting the EPA
22 comments in March. Is that true?

23 MR. MILLS: Objection, compound, argumentative.

24 THE COURT: The question is not compound. The
25 predicate was lengthy. Overruled.

1 THE WITNESS: I believe the process that was
2 developed would result in a more efficient development of
3 a proposed permit. It incorporated the steps that would
4 be needed to address EPA's concerns, and that was more
5 efficient, in my view, yes.

6 BY MR. PENTELOVITCH:

7 Q So adding this extra layer, in your view, was
8 more efficient. That's your conclusion -- or I'm sorry.
9 That was your view at the time?

10 A I didn't view it as an extra layer. I viewed
11 it as a more efficient process to complete --

12 Q But it wasn't --

13 A -- processing a permit.

14 THE COURT: Don't interrupt the answer, please.

15 MR. PENTELOVITCH: Yeah, I apologize.

16 THE WITNESS: It was more efficient, in my
17 view.

18 BY MR. PENTELOVITCH:

19 Q You made findings of fact in conjunction with
20 your signing of the permit. Is that right?

21 A That's correct.

22 Q And conclusions of law? And I just want to
23 enter those into the record so we have them. That would
24 be Exhibit 350.

25 THE COURT: Thank you. There being no

1 objection, the exhibit is received.

2 BY MR. PENTELOVITCH:

3 Q Exhibit 350 are the Findings of Fact,
4 Conclusions of Law, and Order that you signed. Is that
5 correct?

6 A Yes.

7 MR. PENTELOVITCH: Just give me one more
8 moment, your Honor. I need to double-check here.

9 Oh, I do have another question.

10 BY MR. PENTELOVITCH:

11 Q In connection with Exhibit 64, that would be
12 the agreement for the pre-proposed permit, was there ever
13 any discussion within the PCA about whether or not there
14 would have to be another public notice and public comment
15 period on the pre-proposed permit?

16 A Not to my recollection, although I'm generally
17 aware, not on this project but on others, that if there
18 was substantive differences in the drafting of a document
19 or a permit that there could be an additional public
20 notice period provided.

21 Q But there was no discussion, that you're aware
22 of, within PCA about whether you would need to do a
23 second public notice period in conjunction with the
24 pre-proposed permit?

25 A I don't recall having that conversation.

1 Q Did you discuss it with EPA at all?

2 A No, not to my recollection.

3 Q Did you ever after the agreement reflected in
4 Exhibit 64 was reached have a conversation about that
5 agreement with Ms. Stepp or Mr. Thiede yourself?

6 A Not to my recollection.

7 Q You mentioned that there had been a lot of
8 activity, and this was in response to some questions from
9 Mr. Martin, in some public hearings. Is that right?

10 A Yes.

11 Q Did you attend those public hearings?

12 A I don't recall attending those. I believe I
13 attended the public information sessions related to the
14 EIS determination.

15 Q But not the public hearings that were held in
16 February 2018?

17 A I don't recall attending those.

18 MR. PENTELOVITCH: Your Honor, I have no
19 further questions.

20 THE COURT: All right.

21 Any redirect?

22 MR. MARTIN: Your Honor, just a minor point.

23 REDIRECT EXAMINATION

24 BY MR. MARTIN:

25 Q We've had a lot of back and forth about the

1 phrase "pre-proposed permit." Who thought of that term?

2 A My understanding, based on this exhibit that
3 I've heard read to me more than once, was that it was
4 EPA's idea.

5 MR. MARTIN: No further questions, your Honor.

6 THE COURT: Mr. Mills?

7 MR. MILLS: Your Honor, I don't have a
8 question. I just wanted to help facilitate a stipulation
9 about Exhibit 64. Our understanding is that everything
10 in the administrative record has a Bates stamp that
11 begins "WATER," W-A-T-E-R. And Exhibit 64 appears in the
12 administrative record at WATER_0051012 through 0051013.
13 So our understanding is Exhibit 64 is in the
14 administrative record. And, hopefully, that will
15 facilitate a stipulation.

16 THE COURT: All right.

17 MR. MILLS: Thank you.

18 MS. MACCABEE: Your Honor, there are several
19 versions, and some of them have additional information on
20 them. So we need to check which version of the
21 March 16 -- there is some version of a March 16, 2018
22 email that isn't in the administrative record, but I'm
23 not sure if it's this one.

24 THE COURT: Right. But if the actual exhibit
25 that was received has this WATER Bates number on it, is

1 there general agreement that documents with that Bates
2 number on it is evidence that it is in the administrative
3 record?

4 MR. MILLS: Your Honor, if I -- Monte Mills for
5 PolyMet.

6 If I misspoke, Exhibit 64 does not have that
7 Bates stamp.

8 THE COURT: Oh.

9 MR. MILLS: We had to go to the administrative
10 record and find documents with that Bates stamp. And our
11 understanding is that the pages I read are in the
12 administrative record, and they are identical to what
13 appears as Exhibit 64.

14 THE COURT: All right. So that's where the
15 stipulation needs to occur is the agreement, whether the
16 version in the administrative record is the version that
17 is being offered in evidence. And if there are two
18 versions, that also raises a new question of whether
19 someone wants me to see both and argue that the
20 differences have some sort of significance to the issues
21 in front of me.

22 So thanks for all your help, Mr. Mills. Just
23 kidding.

24 MR. MILLS: Yeah. And to be clear, I don't
25 want to read -- please don't read anything into my

1 attempt to help. We would not plan to raise that sort of
2 issue. I was just trying to facilitate.

3 THE COURT: All right. Well, time will tell,
4 won't it?

5 Okay. So, Mr. Stine, you are truly done, and
6 you don't have to come back.

7 THE WITNESS: Thank you, your Honor.

8 THE COURT: And who is going to start after our
9 lunch break?

10 MR. PENTELOVITCH: Ms. Lotthammer.

11 THE COURT: All right. So we'll begin with
12 Ms. Lotthammer at 1:30.

13 Any housekeeping issues? I guess, Mr. Mills,
14 that was a housekeeping issue, right?

15 Anything else?

16 Okay. See you after lunch.

17 (Lunch recess was taken at 12:00 noon until 1:45 p.m.)

18 * * * * *

19 A F T E R N O O N S E S S I O N

20 * * * * *

21 THE COURT: Remain seated.

22 MR. MILLS: Your Honor, may I pick up where we
23 left off? We were talking about Exhibit 64 --

24 THE COURT: Yeah.

25 MR. MILLS: -- and whether that's in the

1 administrative record. We made copies of the version of
2 the email that's in the administrative record, those
3 numbers I read with the "water." And just an idea, we
4 could put this into the record as Exhibit 64A or some
5 other number that folks could agree on. It might be a
6 good way to solve this.

7 THE COURT: Well, are there differences, and
8 are those differences material?

9 MR. MILLS: My sense --

10 MS. MACCABEE: We haven't seen that document,
11 so I don't --

12 THE COURT: Okay. Why don't we do this.

13 MR. MILLS: Yeah, I can hand it out.

14 THE COURT: Let's take care of this off line at
15 the break, compare your versions of Exhibit 64, and
16 let's -- I'm just anxious to have one. And we'll find
17 out if there's any issue, and we'll go from there. All
18 right?

19 Any other housekeeping issues?

20 MR. NELSON: Your Honor, Evan Nelson for
21 Relators.

22 If you recall, yesterday Mr. Pentelovitch read
23 into the record certain portions of the MPCA designee
24 transcript --

25 THE COURT: Yes.

1 MR. NELSON: -- deposition transcript, and you
2 had asked us to prepare a highlighted version of that
3 exhibit --

4 THE COURT: It's on my things-to-do list.

5 MR. NELSON: -- which we have done, and I can
6 offer that right now into evidence.

7 THE COURT: All right. Why don't you come
8 forward.

9 MR. NELSON: I believe you were going to call
10 that Court Exhibit C [sic].

11 THE COURT: Correct.

12 MR. NELSON: And for the record, I've shared a
13 copy of that with other counsel, and no one has
14 objections to it.

15 THE COURT: All right. Good.

16 MR. NELSON: One more thing, your Honor.

17 THE COURT: Hold on.

18 Okay. Go ahead.

19 MR. NELSON: We've received a request from
20 Mr. Gutierrez, the XACT expert who will be testifying,
21 that he testify via ITV on Monday to save on the expense
22 of a plane ticket. I've also conferred with other
23 counsel, and no one has objections to that. If
24 your Honor has no objections, we would use the same
25 technology.

1 THE COURT: It's fine with me.

2 Anything else?

3 All right. Then we will proceed with the next
4 witness.

5 MR. PENTELOVITCH: Your Honor, the Relators
6 call Shannon Lotthammer.

7 THE COURT: Ms. Lotthammer, please come
8 forward. Wave your way through the box to the witness
9 stand, and then when you get there, turn around and face
10 me and raise your right hand.

11 Do you swear to tell the truth, the whole
12 truth, and nothing but the truth, so help you God?

13 THE WITNESS: I do.

14 THE COURT: And then have a seat and state your
15 full name and spell it, please.

16 THE WITNESS: Thank you, your Honor. My name
17 is Shannon Marie Lotthammer. It's S-h-a-n-n-o-n,
18 M-a-r-i-e, L-o-t-t-h-a-m-m-e-r.

19 THE COURT: All right. You may inquire.

20 SHANNON M. LOTTHAMMER,

21 duly sworn, was examined and testified as follows:

22 CROSS-EXAMINATION

23 BY MR. PENTELOVITCH:

24 Q Good afternoon, Ms. Lotthammer. My name is
25 Bill Pentelovitch, and I represent the Relators in this

1 matter.

2 Let's start with some background information.
3 Can you tell us your educational experience after high
4 school?

5 A Yeah. So I went to the University of Minnesota
6 Duluth and received a bachelor's degree in biology and
7 then went on to the University of Minnesota Twin Cities
8 and received a master's degree in ecology with an
9 emphasis on aquatic ecology.

10 Q What year was that?

11 A My master's degree was in 1994.

12 Q So could you tell us what your employment
13 history has been over the last 25 years, please?

14 A Yeah, so basically, just out of grad. school, I
15 worked for the Minneapolis Park Board for a little bit of
16 time as a water quality monitor in a monitoring position.
17 And then in August of 1994, I went to the Minnesota
18 Pollution Control Agency, started as a pollution control
19 specialist there working in the Clean Water Partnership
20 Program and then did various -- or worked kind of through
21 some various positions, pollution control specialist,
22 intermediate, senior, and then a planner principal. And
23 during that time, I worked as a project manager with the
24 Clean Water Partnership Program working on lake and
25 stream restoration projects. I did some strategic

1 planning around water quality monitoring, did some
2 rulemaking support work during that time as well, and
3 then also participated in a group that was working on
4 citizen and stakeholder engagement and so had various
5 kind of progressive duties.

6 And then in 2003, I left the Pollution Control
7 Agency and went to the Prior Lake - Spring Lake Watershed
8 District where I was the district administrator there.
9 And that district is in northern Scott County. Spent
10 three and a half years at the watershed district there
11 working on water quality protection and restoration for
12 the district. And then in the -- in December of 2006, I
13 came back to the Minnesota Pollution Control Agency as
14 the manager of the Water Monitoring Section.

15 Q And how long did you stay in that role?

16 A I was in that role for a little more than three
17 years. And then in, I believe it was June of 2010, I
18 transferred laterally into the manager of the Water
19 Assessment Section, and that included the Effluent Limits
20 Group, the Standards Development Group, and then our
21 Groundwater Monitoring and Assessment and Contaminants of
22 Emerging Concern Group as well at the Pollution Control
23 Agency. I held that position until July of 2012, at
24 which point I became the director of the Environmental
25 Analysis and Outcomes Division. So that included both

1 the Water Monitoring Section and the Water Assessment
2 Section as well as our Air Assessment and Air Monitoring
3 work for the PCA. I held that position until February of
4 2018. And at that point, I was appointed as an assistant
5 commissioner, the assistant commissioner for Water Policy
6 at the Pollution Control Agency, which I held until
7 February of 2019. And at that point, I became an
8 assistant commissioner at the Department of Natural
9 Resources working with the Divisions of Forestry and
10 Parks and Trails and Operation Services. And that is the
11 position that I currently hold.

12 Q Prior to becoming the assistant commissioner in
13 February of 2019, describe for the Court your involvement
14 in the NPDES permitting process.

15 A So when I was the manager and the director in
16 the Environmental Analysis and Outcomes Division, I would
17 occasionally get involved when our Effluent Limits staff
18 were providing support to permitting processes or if
19 there were monitoring questions that were coming up
20 associated with NPDES permits and there was the need for
21 additional kind of management-level discussion or
22 involvement or support providing staff support, things
23 like that.

24 And then when I became the assistant
25 commissioner for Water Policy, I had a coordinative role

1 kind of across the agency for our Water Program work and
2 so ultimately had kind of the first review step within
3 the commissioner's office around permitting and
4 environmental review and things like that for our Water
5 Program.

6 Q Prior to becoming the assistant commissioner,
7 during what years, again remind us, were you in a
8 position where you did have some contact with the NPDES
9 process.

10 A From 2010 to 2018 basically.

11 Q Okay. In that period, 2010 to 2018, did you
12 interface at all with the EPA Region 5 on NPDES permit
13 issues?

14 A I didn't interface directly with EPA. Some of
15 the staff that I oversaw interfaced with them on
16 standards development and on variances and occasionally
17 on effluent limit kinds of questions. That was really
18 something that occurs more regularly at the staff and
19 supervisor level. But I was occasionally involved in
20 conversations.

21 Q Now, you said that you became the assistant
22 commissioner in February of 2018. Was there a particular
23 date in February of 2018 that you took that role?

24 A There was. And I want to say -- I'm sorry, I
25 don't remember the exact date -- perhaps February 22 or

1 17. I was on vacation for a week, and then when I came
2 back I became the assistant commissioner.

3 Q So it would be fair to say the middle to end of
4 February?

5 A Yeah. I would say closer to the end of
6 February.

7 Q Okay. I'm going to ask you a few questions
8 about the electronic devices you utilized while you were
9 at the EPA. And in particular, I want to focus on
10 devices you would have used starting in February of 2018.
11 Did you have a state-issued laptop?

12 A I did, yes.

13 Q And did you turn that in to the PCA before you
14 left for DNR, or did you take it to DNR with you?

15 A I turned it in.

16 Q Okay. Before you turned it in, did you delete
17 anything from your laptop?

18 A I did go through and delete emails and files
19 that I didn't believe were records that needed to be
20 preserved. But I was very careful to maintain things
21 that I thought potentially could be records that needed
22 to be preserved going forward for the businesses --
23 business of the PCA.

24 Q And did you do that in February of 2019 where
25 you went through the laptop and deleted things?

1 A Yes, I did, yeah.

2 Q Okay.

3 A I didn't want to leave, you know, things that
4 somebody else had to wade through, and so I wanted to
5 make sure that if there were things that were more
6 transactional in nature and not something that was a
7 record that I took that responsibility on so somebody
8 else didn't have to do it.

9 Q Did you consult with anybody at the MPCA about
10 what you should or should not delete before you turned
11 your laptop in?

12 A I didn't specifically consult at the time that
13 I was turning my computer in and changing positions, but
14 I often would consult with PCA folks on particular
15 questions of, you know, what to keep or how to keep it,
16 whether it was something that needed to go into our
17 OnBase system and who could do that or if there was a
18 question about a particular record.

19 Q During your tenure as assistant commissioner,
20 did you use a state-issued desktop computer?

21 A No, I didn't. My laptop was my desktop.

22 Q During your tenure as assistant commissioner,
23 did you use a tablet, an iPad, or a Samsung tablet or
24 anything similar?

25 A I didn't.

1 Q During your tenure as assistant commissioner,
2 did you have a cell phone?

3 A Yes, I did.

4 Q Was it state issued?

5 A Yes, it was.

6 Q What kind -- was it an iPhone or a --

7 A It was an iPhone.

8 Q iPhone? And did you turn that in before you
9 went over to DNR to keep --

10 A I did. I turned that in before I went to DNR.

11 Q Before you turned in your phone, did you delete
12 anything from it?

13 A No.

14 Q Did you have any other electronic devices,
15 whether state issued or personally owned, during the
16 period that you were the assistant commissioner?

17 A I had a personal iPhone --

18 Q Okay.

19 A -- and a personal laptop, too.

20 Q Did you have a personal email account?

21 A Yes.

22 Q Did you ever forward anything from your state
23 email account to your personal email account?

24 A I -- yes. If I received like an invitation to
25 a happy hour or something like that, I would forward

1 things occasionally so that I had that at home for my
2 home calendar.

3 Q Did you ever forward any other types of
4 information from your work email to your personal email?

5 A No.

6 Q When you left MPCA to go to DNR, did you go
7 through your personal laptop and delete anything that
8 might have been related to the MPCA?

9 A No, because I wouldn't have. I didn't have
10 anything on my personal laptop related to work.

11 Q I can't recall. Did you say you had a tablet
12 as well?

13 A No. I -- so my laptop at work was kind of a
14 laptop/tablet sort of combination. But I didn't have
15 anything separate to that, and I didn't have a tablet at
16 home, a personal tablet.

17 Q Was that a Windows-based device, or was it
18 Apple?

19 A It was Windows-based.

20 THE COURT: Was it like a Surface?

21 THE WITNESS: It might have been. I don't
22 remember exactly, but I think that might have been what
23 it was. It was -- so it's the kind of device that has a
24 keyboard on it, as well as you can take the screen off
25 and use it as a tablet. I always used it basically as a

1 laptop, but it was nice because it was very lightweight
2 and easy to carry around.

3 BY MR. PENTELOVITCH:

4 Q And we're talking now about the state-issued?

5 A Yes. Yes.

6 Q Okay. I'm going to hand you what's been marked
7 for identification as Exhibit 275.

8 THE COURT: Hearing no objection, it's
9 received.

10 BY MR. PENTELOVITCH:

11 Q Showing you what's been marked for
12 identification Exhibit 275, which is an email dated
13 January 17, 2018 from an individual named Jeff Udd to
14 several people, including yourself, do you recall
15 receiving -- and it's set as an appointment, if you look
16 in the upper left-hand corner, so it's like an Outlook
17 appointment thing. Do you recall receiving this email at
18 or about the date it bears?

19 A I don't remember.

20 Q Do you know why you were receiving this email
21 prior to your assuming the position as assistant
22 commissioner?

23 A I would suspect that it was because I had been
24 identified as going to be the assistant commissioner, and
25 so we were in the transition between when I was becoming

1 the assistant commissioner and Rebecca Flood, the
2 assistant commissioner, was retiring. Folks were
3 starting to copy me on some things so that I would be,
4 you know, more up to speed when I actually assumed the
5 position.

6 Q Would you describe for the Court what your
7 involvement was with the PolyMet NorthMet permit
8 application between July '16 -- I'm sorry, July of 2016
9 when it was filed and January 17, 2018, the date of this
10 email?

11 A My involvement was responding to questions for
12 staff support, so providing -- if there was need to
13 provide some additional staff support for review, things
14 like that. Occasionally, I would hear updates about the
15 PolyMet permit process when I would sit in with some of
16 the other directors on the Water director's call that EPA
17 Region 5 had with Assistant Commissioner Flood. And then
18 occasionally, I would hear about updates if I was also
19 going -- if I was presenting information to -- for
20 example, we had regular quarterly meetings with tribes,
21 and occasionally -- or there were -- there were regular
22 quarterly mining meetings as well. And because I was
23 working on a different rulemaking, I would occasionally
24 provide updates there, and sometimes the progress or
25 the -- where things were at with the PolyMet permit were

1 updates that were happening at that time, too.

2 Q Did you make notes of any of these meetings
3 you've just described?

4 A No.

5 Q What was your general practice about making
6 notes of meetings?

7 A My general practice was to, you know, if there
8 was something that I needed to follow up on or that I
9 needed to remember for the next meeting, I would jot that
10 down, but my -- I wasn't in the practice of taking
11 detailed notes.

12 Q And that would be true of either handwritten
13 notes or typed notes?

14 A Yes, that's correct.

15 Q Okay. If you look at the second paragraph of
16 Exhibit 275, Mr. Udd wrote, "Remember that the water
17 documents were given to the tribes and EPA on Wednesday,
18 1/17, for early notice."

19 My question to you is, did you understand at
20 the time you received Exhibit 275 what the significance
21 of that statement was or was not?

22 A Well, I understood that our standard practice
23 was to provide advance notice to the tribes for permits
24 that they were interested in prior to the public notice
25 of that. But that was the extent of my understanding of

1 that sentence.

2 Q I want to come back to your electronic devices
3 for just a second.

4 At the time you left the MPCA, was there a
5 legal hold of any type in effect for any portion of your
6 files or electronic records?

7 A Yes, there was. I --

8 Q What did that relate to?

9 A So there was a legal hold with respect to the
10 Interstate 35 Bridge collapse, and I don't remember for
11 sure, but there might have still been a legal hold in
12 place for the Minntac tailings basin permit that had been
13 contested earlier, or the process had been contested.
14 And so actually, when I was leaving the Pollution Control
15 Agency, I made sure to alert the office staff that I did
16 have data that was subject to a legal hold and that that
17 needed to be preserved.

18 Q Now, at the time you left MPCA for DNR in
19 February of 2019 and were going through your devices to
20 delete material, at that point, there had already been an
21 appeal of the permit -- or a certiorari appeal of the
22 permit from the -- the PolyMet permit I should say, from
23 the MPCA to the Minnesota Court of Appeals. Were you
24 aware of that?

25 A Yes, I was.

1 Q And did you inquire of anybody as to whether
2 there was or whether there should be a legal hold in
3 place as to any of the material that you were looking at
4 for consideration of deletion?

5 A So I didn't inquire because our standard
6 practice is that when there was a legal hold, our legal
7 staff would send that out -- well, first of all, inquire
8 as to who might have information and then send out that
9 information about the legal hold.

10 Q So you had not received a legal hold?

11 A That's correct.

12 Q As you were going through your devices in
13 February of 2019, did you give any consideration yourself
14 to whether there was material you should not delete
15 because of the fact of the appeal from the MPCA to the
16 court of appeals?

17 A I -- well, I was definitely keeping in mind
18 what our data practices procedures were, and so that was
19 what was in kind of my forethought or what I was thinking
20 about as I was going through the information. I also
21 knew that there had been Data Practices Act requests.
22 And in fact, there was one that had ended just before I
23 left, and so I was also making sure that I was responding
24 to that and getting those responses completed, again, so
25 that somebody else didn't have to assume that

1 responsibility after I left the agency.

2 Q But you were not specifically thinking about
3 what needed to be retained in the event it was needed for
4 the appeal or for the administrative record on the
5 appeal. Is that correct?

6 A Not -- I mean, I didn't have the appeal in
7 mind. But again, I was following our procedures about
8 what records needed to be retained as, you know, a part
9 of agency activities.

10 Q In the period between the issuance of the
11 permit in December and your departure from MPCA in
12 February, did you have any responsibility for assembling
13 the administrative record that was going to go up on
14 appeal to the court of appeals?

15 A I did not.

16 Q Do you know who was responsible within the
17 agency for that?

18 A I do not.

19 Q Ms. Lotthammer, you're going to see there are
20 some exhibits, I believe, on the table in front of you.

21 A Assuming they're these?

22 Q There should be a bigger pile there. Is that
23 the entire file? Oh, that's it. Okay.

24 A Okay.

25 Q So in there you should find an exhibit marked

1 333. It will be at the top center of the page. Would
2 you take that and put it in front of you?

3 A Yes.

4 Q Exhibit 333, which I think everybody in this
5 courtroom may have memorized at this point, is an email
6 from you to Kurt Thiede on March 13, 2018. Do you
7 recognize this email?

8 A Yes, I do.

9 Q In preparation for your testimony here today,
10 did you review it?

11 A Yes, I did.

12 Q Did you meet with anybody to discuss it?

13 A With counsel.

14 Q Okay. And when you say counsel, to whom are
15 you referring?

16 A I'm referring to the Holland & Hart counsel
17 that are representing us here today.

18 Q And how many times did you meet with the
19 Holland & Hart counsel prior to coming here today to
20 testify?

21 MR. MARTIN: Objection. Attorney-client
22 privilege.

23 MR. PENTELOVITCH: How many times is not
24 privileged.

25 THE COURT: No, that's not privileged.

1 MR. MARTIN: Your Honor, the fact of the
2 meeting is privileged, as I understand it.

3 MR. PENTELOVITCH: The fact of the meeting is
4 now in the record.

5 MR. MARTIN: How many times?

6 THE COURT: I'm overruling the objection.

7 BY MR. PENTELOVITCH:

8 Q How many times?

9 A Three times, I believe.

10 Q When was the most recent?

11 A The most recent was on Sunday.

12 Q And for how long?

13 A Three hours.

14 Q And prior to that, tell me the other times you
15 met with the Holland & Hart folks.

16 A I met the week previous for about two hours,
17 and then we had a -- actually, those were the only two
18 times that -- no. I'm sorry. That's wrong. I met
19 previously for about two hours, and then there was about
20 a one-hour conversation a week before that.

21 Q Okay. Who was that conversation with?

22 A Mr. Rich Schwartz.

23 Q Okay. And who was present during your two
24 face-to-face meetings besides yourself?

25 A So the first meeting, it was Mr. Schwartz and

1 Mr. Bryce -- or Bryce --

2 Q Bryson Smith?

3 A Bryson Smith, thank you. And then the second
4 meeting, it was Alison and Mr. Martin and Mr. Schwartz
5 and then Mr. Tester from the Pollution Control Agency.
6 And then the last meeting, it was -- it was Alison and
7 Mr. Martin.

8 Q When you say Mr. Hexter --

9 A Tester.

10 Q Tester. Who is Mr. Tester?

11 A He's the deputy commissioner for the Pollution
12 Control Agency.

13 Q Is he a lawyer?

14 A Yes.

15 Q I would like you to tell the Court, to the best
16 of your memory, how it came about that you wrote
17 Exhibit 333.

18 A Sure. So basically, the first was that
19 Mr. Jeff Udd, who is the manager of the NPDES permit area
20 that involves mining, had been part of regular meetings
21 and had been meeting regularly with EPA while the --
22 well, basically throughout the permitting process. And
23 Mr. Udd had come to me and explained that EPA was
24 considering sending comments on the draft permit during
25 the public comment period. And Mr. Udd had expressed

1 some concerns about that because of the amount of
2 comments that were being received during the public
3 comment period, the load of staff -- the load that that
4 was representing to review and respond to all of those on
5 staff time and then also the fact that there had been
6 ongoing kind of -- or ongoing discussions and meetings
7 with EPA. And so we already knew both what some of the
8 feedback was from EPA and from the public, and we were
9 planning on making changes to the permit to reflect that.
10 So when Mr. Udd came to me with that, I also had some
11 concerns about the efficiency of if EPA were to send
12 written comments on a version of the permit that we were
13 already planning on making changes to --

14 Q Before you go on with your concerns, I want to
15 go back to Mr. Udd.

16 A Okay.

17 Q To the best of your ability, tell us what words
18 Mr. Udd used when speaking to you.

19 A I'm sorry, but I can't tell you the exact
20 words.

21 Q Okay.

22 A I don't remember the exact words.

23 Q Now, you started telling us about your own
24 concern about efficiency. Go on and finish telling us.

25 A Okay. So I had concern about the efficiency of

1 EPA providing written comments on a version of the permit
2 that we already knew that we were going to be revising.
3 And so subsequent to that conversation with Mr. Udd then,
4 I gave Mr. Kevin Pierard a call and asked Mr. Pierard if
5 EPA would consider holding off on providing written
6 comments until we had received the public comments, made
7 the changes to the permit that we were already
8 anticipating, and provided EPA with an updated version of
9 the permit that represented an improved work product for
10 them to review.

11 Q Okay. Let's stop right there. On what date
12 did you call Mr. Pierard?

13 A I don't remember the exact date, but I believe
14 it was during the week of March 5.

15 Q And had you known Mr. Pierard prior to this
16 time?

17 A Yes.

18 Q How had you known him?

19 A I knew him from group meetings with EPA and PCA
20 staff as the section manager for the NPDES permitting
21 section.

22 Q And had you had any group meetings with
23 Mr. Pierard prior to the phone call where PolyMet was
24 discussed?

25 A No.

1 Q Was this your first contact with Mr. Pierard
2 about PolyMet?

3 A Yes.

4 Q How long approximately did your conversation
5 with Mr. Pierard last?

6 A I don't remember.

7 Q To the best of your recollection, please tell
8 the Court what you said to Mr. Pierard and what
9 Mr. Pierard said to you.

10 A Yeah. So to the best of my recollection, I
11 expressed that request to Mr. Pierard for EPA to consider
12 holding off on written comments since we knew that we
13 would be making changes to the permit. Mr. Pierard
14 didn't accept or reject that, but he did express a
15 concern about transparency and, you know, the need to be
16 very transparent in the process. I agreed that
17 transparency was very important and that that was
18 something that we very much valued, that we weren't
19 trying to suggest not to, you know, get comments or be
20 transparent and that we were simply requesting that EPA
21 consider allowing us to provide the updated work product
22 before they weighed in with their formal written
23 comments.

24 Q And what did he say?

25 A He said -- again, I don't remember the exact

1 words, but, essentially, that he would discuss that
2 within EPA, and, you know, they would take that into
3 consideration. And I think in particular, he mentioned
4 that he would be discussing it with Mr. Chris Korleski,
5 who was the Water director at EPA at the time.

6 Q And did you know Mr. Korleski as well?

7 A I did.

8 Q And in the same way you knew Mr. Pierard or in
9 a different way?

10 A Well, I knew Mr. Korleski because he had taken
11 the -- or had been transferred -- I'm not sure how that
12 exactly worked -- but the Water director position at EPA
13 Region 5. And one of the, kind of the ongoing
14 responsibilities of that position is that the Water
15 director holds regular conference calls with the other --
16 the Water directors from the Region 5 states. So I had
17 participated in those conference calls and in other Water
18 program areas had had a couple of interactions with
19 Mr. Korleski as well.

20 Q Prior to making the phone call to Mr. Pierard,
21 did you tell anybody at MPCA that you were going to call
22 Mr. Pierard?

23 A I believe that Mr. Udd and I spoke about me
24 calling Mr. Pierard. I also know that I spoke with
25 Mr. -- or Commissioner John Linc Stine, but I don't

1 remember if I spoke with him before I called Mr. Pierard
2 or after I called Mr. Pierard.

3 Q With respect to your conversation with Mr. Udd,
4 did you and Mr. Udd discuss what you should say to
5 Mr. Pierard during that phone call?

6 A Not specifically. I mean, we discussed the
7 idea of seeing if EPA would be amenable to holding off on
8 written comments until after we had updated the permit,
9 but we didn't talk about the specific details or aspect
10 of that.

11 Q Did you and Mr. Udd discuss whether EPA -- I'm
12 sorry. Did you and Mr. Udd discuss whether the MPCA had
13 ever before asked the EPA to refrain from making
14 comments, written comments during a public comment
15 period?

16 A No, we did not.

17 Q Did you know whether or not MPCA ever in the
18 past asked the EPA to refrain from making written
19 comments during the public comment period?

20 A No, I didn't.

21 Q Approximately how long did your call with
22 Mr. Pierard last?

23 A I don't remember how long it was.

24 Q Okay. After the call with Mr. Pierard --
25 strike that.

1 Did you make notes of your conversation with
2 Mr. Pierard?

3 A No, I did not.

4 Q Did you make a memo summarizing the call?

5 A No, I did not.

6 Q Following the call, what did you do next with
7 respect to the request that ultimately ended up in
8 Exhibit 333?

9 A So next, I spoke with Mr. Korleski. I believe
10 I called him, but I don't remember for sure. But I do
11 believe that --

12 Q Do you mean Chris Korleski?

13 A Yes, Mr. Chris Korleski. Sorry.

14 Q Go ahead.

15 A And again, reiterated the request that EPA
16 consider holding off on providing written comments until
17 after the agency had had an opportunity to make the
18 improvements that we were already anticipating.

19 You know, I also want to point out that we had
20 been in regular conversation -- our staffs had been in
21 regular conversation between EPA and MPCA, which wasn't
22 something that was always typical with permits --

23 Q Right. I'm only interested right now in your
24 conversations.

25 A Yeah. Okay. I understand.

1 Q Okay.

2 A And --

3 Q Let's --

4 A But I may have pointed --

5 Q Let's --

6 A -- either to Mr. Korleski or to Mr. Pierard.

7 But --

8 Q Okay. Let me ask you a question.

9 A Yes.

10 Q In your conversation -- when did your
11 conversation with Mr. Korleski take place relative to
12 your conversation with Mr. Pierard? Was it the same day?

13 A I don't remember if it was the same day.

14 Q Do you know approximately how much time passed
15 between the two conversations?

16 A I don't.

17 Q Do you recall how long your conversation with
18 Mr. Korleski was?

19 A I do not.

20 Q Did you make notes of that conversation?

21 A I did not.

22 Q Did you make a memo summarizing it?

23 A No.

24 Q How did Mr. Korleski respond to you?

25 A So Mr. Korleski indicated that -- or at least I

1 got the impression that he and Mr. Pierard had spoken
2 about the requests that we were making.

3 Q How did you get that impression?

4 A Because Mr. Korleski indicated that one of the
5 things that EPA staff were concerned about was the timing
6 of providing that subsequent draft and ensuring that EPA
7 had sufficient time for a meaningful review of that
8 updated draft of the permit. And I had indicated that
9 we -- the Pollution Control Agency was certainly very
10 interested in EPA having plenty of time to have that
11 review and that, you know, if there was something we
12 could do to talk about providing -- making sure that EPA
13 had sufficient time to review that updated work product,
14 that we were happy to do that.

15 Q Okay. Now, I would like you to, to the best of
16 your memory, tell us everything Mr. Korleski said to you,
17 not your impression but what he actually said to you
18 during the conversation.

19 A So to the best of my memory, Mr. Korleski
20 mentioned the concern about timing and indicated that
21 that might be something that would be helpful to talk
22 about or think about if this were to -- if this was
23 something that EPA were to agree to. And then he also
24 indicated that they needed to have further conversations
25 within EPA.

1 Q Did he say anything else that you can remember?

2 A Not that I can remember.

3 Q And did you say anything else to him that you
4 remember beyond what you've already told us?

5 A Not that I remember, no.

6 Q In that case, tell us what happened next in the
7 sequence of events.

8 A So as I had mentioned earlier, I had been, you
9 know, keeping Mr. Stine, Commissioner Stine apprised of
10 the inquiry that I was making to EPA --

11 Q Let's stop right there. I don't recall your
12 saying. Did you talk to Mr. Stine between the call with
13 Mr. Pierard and the call with Mr. Korleski?

14 A So I had earlier said I did speak with
15 Mr. Stine, but I don't remember if it was before the call
16 with Mr. Pierard or after the call with Mr. Pierard.

17 Q Do you recall -- do you recall if you talked --
18 so you don't recall if it was before the conversation
19 with Mr. Korleski or after the conversation with
20 Mr. Korleski?

21 A I believe it was before the conversation with
22 Mr. Korleski, but --

23 Q Okay. Tell us everything you remember about
24 this conversation with Mr. Stine regardless of if it
25 occurred before or after the conversation with

1 Mr. Pierard.

2 A So I don't remember the details of the
3 conversation, just other than informing or letting
4 Mr. Stine know that -- that I was making that inquiry to
5 EPA. And certainly, you know, as a part of that, it
6 would be ensuring that Mr. Stine was -- didn't have a
7 concern about that.

8 Q Did Mr. Stine raise any concerns about the
9 propriety of requesting EPA not to make written comments
10 during the public comment period during that
11 conversation?

12 A No.

13 Q Did he raise any other concerns?

14 A Not that I recall, no.

15 Q After the conversation with Mr. Korleski, did
16 you have a conversation with Mr. Stine in which you
17 reported on what occurred in the conversation with
18 Mr. Korleski?

19 A I don't specifically remember, but I -- all I
20 can tell you that I'm sure of is that, you know, I was
21 keeping Mr. Stine apprised of my conversations with EPA.

22 Q Were you apprising Mr. Stine by email, by
23 voicemail, or in person?

24 A In person.

25 Q Where was your office relative to Mr. Stine's

1 office?

2 A It was -- so the commissioner's office, you go
3 through a door, and then there's the commissioner's
4 office. There's three offices in a row. Mr. Stine's
5 office was at one end, and mine was two doors down, so we
6 were within loud voice distance of each other.

7 Q Shouting distance?

8 THE COURT: What building?

9 THE WITNESS: So 520 Lafayette Road.

10 THE COURT: Okay. That's fine.

11 BY MR. PENTELOVITCH:

12 Q After the conversation with Mr. Korleski, what
13 is the next thing you recall in the sequence of events?

14 A So the next thing I recall is receiving the
15 email where Mr. Stine put me into contact with
16 Mr. Korleski. And it was an email where he was
17 responding to an email from Ms. Cathy Stepp, the EPA
18 Region 5 Regional Administrator. And in that email,
19 Mr. Stine indicated that I would be following up with
20 Chief of Staff Kurt Thiede on the matter of the
21 agreement, which I understood from our conversations to
22 mean the -- providing the memorandum of agreement and
23 this request about the timing of EPA's comments on the
24 draft.

25 Q Did you ask Mr. Stine to call Ms. Stepp and/or

1 Mr. Thiede to discuss the request for a -- the request to
2 the EPA not to file written comments during the public
3 notice period?

4 A No, not that I recall.

5 Q Did you know that Mr. Stine was going to be
6 talking to them about that subject before he made the
7 call -- before he had the call?

8 A I knew Mr. Stine was going to be having a
9 conversation with Ms. Stepp about a number of things, but
10 I didn't know exactly what they would be talking about.

11 Q Did you know that PolyMet was going to be one
12 of the things they were going to be talking about?

13 A No, I did not.

14 Q Did you know that Mr. Stine planned to raise
15 with Ms. Stepp or Mr. Thiede the issue of the EPA not
16 filing written comments during that conversation before
17 the conversation took place?

18 A I don't believe that I knew one way or another.

19 Q You referenced a memorandum of agreement. Had
20 you and Mr. Stine had any discussions about the impact of
21 the memorandum of agreement on the request being made to
22 the EPA prior to Mr. Stine calling Mr. Thiede and
23 Ms. Stepp?

24 A I don't know.

25 Q Do you recall how the subject of the MOA even

1 came up?

2 A No, not -- I don't.

3 Q Had you known Ms. Stepp prior to March 13 of
4 2018?

5 A No.

6 Q Had you known Mr. Thiede prior to that time?

7 A No.

8 Q So they were both essentially strangers to you?

9 A Yes.

10 Q Did you know how long either one had been in
11 their positions at Region 5?

12 A Not -- no, not with any specificity. I knew
13 that they were both fairly new to Region 5 and that they
14 had been in Wisconsin prior to that, but I didn't know
15 how long.

16 Q Did you have any knowledge as to what their
17 individual backgrounds were with NPDES permitting?

18 A No.

19 Q And would it be fair to say that PolyMet was
20 the first occasion in which an NPDES permit was being
21 reviewed -- or application for permit was being reviewed
22 for approval where you had supervisory authority over
23 that process?

24 A No.

25 Q It's not the first time?

1 A I don't -- well, there were multiple permits
2 that were in process when I became the assistant
3 commissioner, and so I wouldn't say that this was the
4 first one.

5 Q The question is, is -- well, let me rephrase
6 it.

7 Was -- the PolyMet permits, plural, prior to
8 your becoming assistant commissioner, did you have any
9 supervisory authority over any NPDES permitting for other
10 projects prior to becoming assistant commissioner and
11 becoming involved in the PolyMet permitting?

12 A So no. And -- but I would also add that I
13 didn't have supervisory authority over the PolyMet
14 permit, either, in the sense of being the supervisor of
15 the team, because as the -- the assistant commissioners
16 provide policy advice and review, but we don't have line
17 authority -- or we didn't have line authority in the --
18 at the Pollution Control Agency.

19 Q So who was the supervisor of the team handling
20 the PolyMet permitting review?

21 A Jeff Udd was.

22 Q And who did he report to?

23 A He reported to Jeff Smith.

24 Q And who did Jeff Smith report to?

25 A Jeff Smith reported to Deputy Commissioner

1 Michelle Beeman.

2 Q And who did she report to?

3 A Commissioner John Linc Stine.

4 Q So Mr. Udd wasn't even in your line of
5 reporting authority?

6 A No.

7 Q So why were you becoming involved in the
8 question of what's efficient?

9 A Again, because the way that the Pollution
10 Control Agency structure is laid out is that the agency
11 has sort of a functional structure as far as the
12 municipal and industrial permitting and Environmental
13 Analysis and Outcomes Division. And in that -- that's
14 intentional because a lot of the issues kind of have a --
15 or a lot of the work, I should say, has kind of a
16 functional structure to it. But then we also have a
17 media-based interest and responsibility. And when I say
18 media, I mean air, water, land. And that's really the
19 function that the assistant commissioners played then.
20 It's a matrix organization, and so the assistant
21 commissioners played a role in integrating across those
22 divisions. And so while I didn't have line authority, I
23 still had a review and policy role as a part of that.

24 Q But the people who supposedly were overburdened
25 with work because of all the public comments were in a

1 reporting line of authority to somebody other than you?

2 A Yes, that's correct. But at the same time, I
3 was the PCA's Water contact with EPA, so it was
4 reasonable for Jeff -- for Mr. Udd to be, you know,
5 discussing these matters with me.

6 Q Well, did his supervisor, either his
7 supervisor, Mr. Smith, or Mr. Smith's supervisor,
8 Ms. Beeman, become involved in the discussions whether or
9 not to make this request to the EPA?

10 A I don't believe so, no.

11 Q After Mr. Stine sent his email to Ms. Stepp and
12 Mr. Thiede, was the next event your drafting of
13 Exhibit 333?

14 A Yes.

15 Q Did anybody help you draft it?

16 A No.

17 Q Did you ask anybody to review it before you
18 sent it out?

19 A No, not that I recall.

20 Q I noticed you copied nobody else in the PCA on
21 this email. At least you didn't openly copy. Did you
22 blind copy anybody on this email?

23 A No, I don't believe so.

24 Q Is there a reason you copied nobody else?

25 A No, not that I recall.

1 Q Did you seek legal advice before sending this
2 email?

3 A No.

4 Q If you look at Exhibit 333, please, in the
5 second paragraph, you reference the memorandum of
6 agreement, and you attach it. Did Mr. Stine give you any
7 indication of what discussions he had had with Mr. Thiede
8 and Ms. Stepp -- well, I guess it didn't go to Ms. Stepp
9 either. It went only to Mr. Thiede, right?

10 A Yes.

11 Q Did he give you any indication, however, of
12 whatever conversation he might have had with Mr. Thiede
13 and Ms. Stepp about the memorandum of agreement?

14 A I don't remember.

15 Q Do you recall why you were even raising the
16 memorandum of agreement as an issue in this email?

17 A So what I recall is that the -- the memorandum
18 of agreement kind of lays out information about the
19 process for kind of moving through the EPA review and
20 approval process. And so what I recall is an interest
21 in, you know, assuring that anything that we do is
22 consistent with the memorandum of agreement, but I don't
23 remember specifics beyond that, yeah.

24 Q In the second paragraph -- I'm sorry. The
25 third paragraph of Exhibit 333, you write, "As you'll

1 note, in the highlighted portions of pages 27 to 28 of
2 the attached PDF, which are pages 10 to 11 of the actual
3 MOA, the established processes for MPCA to place the
4 draft permit on public notice, consider and respond to
5 public comments, and make any resulting changes that are
6 necessary, and then to submit the proposed permit to EPA
7 for review and comment (which could include objection)
8 prior to final issuance."

9 What led you to the conclusion that writing
10 that sentence was an accurate recitation of the MOA?

11 A Reviewing the MOA and looking at what the MOA
12 said about those steps, that's what that was intended to
13 summarize.

14 Q Well, in fact, where you say there that the
15 process was to put the permit on public notice, consider
16 and respond to public comments, make changes, and then
17 submit the proposed permit to EPA for review and comment,
18 that's not what the MOA says, is it?

19 A I believe it is what the MOA says.

20 Q Doesn't the MOA say that the EPA gets the
21 proposed permit submitted to it at the same time the
22 draft permit is put on public notice?

23 A Oh, it does. And -- but I wasn't thinking
24 about prior to the draft permit. This was -- when I was
25 writing this, it was thinking about from the public

1 notice forward --

2 Q Well --

3 A -- so it wasn't -- it wasn't intended to be
4 exclusionary of earlier steps.

5 Q You knew at the time you wrote this that the
6 public notice, the fact summary, and the proposed permit
7 had all already been submitted to EPA, didn't you?

8 A Yes, I knew that.

9 Q And you knew at the time that it had been the
10 historic practice of EPA to submit written comments
11 during the public notice period, right?

12 MR. MARTIN: Objection, assumes facts not in
13 evidence.

14 MR. PENTELOVITCH: I asked --

15 THE COURT: Sustained.

16 MR. PENTELOVITCH: -- her if she knew.

17 BY MR. PENTELOVITCH:

18 Q Did you know?

19 A I knew that EPA sometimes submitted comments
20 and sometimes didn't.

21 Q But you knew it was not unusual for the EPA to
22 submit written comments during the public notice period,
23 didn't you?

24 A That's true. And again, that established
25 process was the steps from the public notice forward, not

1 trying to suggest anything about previous to that public
2 notice. That's what I was focusing on when I was
3 summarizing that.

4 Q You don't know what Mr. Thiede's level of
5 familiarity was with the memorandum of agreement at the
6 time -- prior to the time you wrote this email, correct?

7 MR. MARTIN: Objection, calls for speculation.

8 MR. PENTELOVITCH: I asked her if she knew or
9 didn't know.

10 THE COURT: That's correct. It's overruled.

11 THE WITNESS: No.

12 BY MR. PENTELOVITCH:

13 Q And you didn't know one way or another whether
14 Ms. Stepp had any familiarity with the memorandum of
15 agreement prior to writing this email, correct?

16 A I knew Ms. Stepp had worked in Wisconsin on
17 environmental issues, but I didn't know specifically if
18 she was familiar with the memorandum of agreement.

19 Q Well, she was not working on the Minnesota
20 memorandum --

21 A Correct.

22 Q -- of agreement, anyway, right?

23 A Correct.

24 Q In the next paragraph, it would be the fourth
25 paragraph, beginning at the end of the second line, you

1 wrote, "We know that we will be making some changes to
2 the draft permit in response to public comments, and also
3 questions raised by EPA. We have asked that EPA Region 5
4 not send a written comment letter during the public
5 comment period and instead follow the steps outlined in
6 the MOA and wait until we have reviewed and responded to
7 public comments and made associated changes before
8 sending comments from EPA."

9 I read that correctly, right?

10 A Yes.

11 Q But the established practice was that EPA often
12 did send written comments during the public notice
13 period, wasn't it?

14 A Yes. And we --

15 Q And to your knowledge, was this the first time
16 that MPCA had ever in writing asked EPA not to make
17 written comments during the public notice period?

18 A I don't know.

19 Q So you don't know one way or the other?

20 A Correct.

21 Q You have no knowledge of it occurring
22 previously, though, right?

23 A And -- I have no knowledge one way or another.

24 Q If you go down to the penultimate paragraph,
25 the last sentence there reads, "The question is about the

1 timing of the review and the importance of maintaining
2 the approach laid out in the MOA for the sake of clarity
3 and efficiency, among other goals."

4 What is the, quote, approach laid out in the
5 MOA, closed quote, to which you are making reference in
6 Exhibit 333?

7 A So what I was referencing to -- or what I was
8 referencing was the concept of the public notice
9 happening, getting comments during the public notice
10 period, responding to those comments, and updating -- or
11 making changes to the permit as needed based on those
12 comments, and then submitting all of that to EPA. And
13 what I was referring to as I was writing this was that,
14 knowing that we were going to be making changes to the
15 permit and wanting to get the best work product in front
16 of EPA for their formal review and comment, it seemed
17 like that approach within the MOA of the public comments
18 and then making changes based on those comments and then
19 providing that all to EPA so they had our best work
20 product to review made a lot of sense from a clarity
21 standpoint and an efficiency standpoint.

22 Q But the approach laid out in the MOA allows EPA
23 to make comments during the public period -- public
24 comment period, correct?

25 A Well, actually, no. I mean, the -- no in the

1 sense that the MOA is silent on that aspect. And in
2 fact, Mr. Thiede asked me about that when we spoke, and
3 he asked is PCA suggesting that EPA can't make comments
4 during the public comment period and the MOA would
5 prohibit that, and I said no. The MOA is silent as to
6 EPA's comments or not comments during the public comment
7 period. The approach I was referring to is, following
8 the public comment period, there's this step-wise
9 approach that, to me, made a lot of sense given where we
10 were at with the PolyMet permit. We had been talking
11 with EPA, we knew that we were going to be making
12 changes, and we were requesting the opportunity for EPA
13 to have all of that before they sent written comments.

14 Q And you were asking them to refrain from
15 commenting during the public comment period. So your
16 request didn't have to do with after the public comment
17 period. You were making a request about something to
18 occur or not occur during the public comment period,
19 correct?

20 A I disagree. I was making a request to
21 comment -- for EPA to comment after the public comment
22 period, and so that did have to do with after the public
23 comment period. And clearly, what I was clearly trying
24 to convey was that, from our perspective, the PCA's
25 perspective, it would be a more efficient and a better

1 review process if EPA had the advantage of the updated
2 permit based on the public comments that we had received
3 and then had their review and provided their written
4 comments at that point.

5 MR. PENTELOVITCH: Could you read the question
6 back to the witness -- could I have the question read
7 back to the witness, please?

8 THE COURT: Yes. Why don't you read it back
9 beginning with the word "and."

10 THE COURT REPORTER: "And you were asking them
11 to refrain from commenting during the public comment
12 period. So your request didn't have to do with after the
13 public comment period. You were making a request about
14 something to occur or not occur during the public comment
15 period, correct?"

16 BY MR. PENTELOVITCH:

17 Q Could you answer that question, please?

18 A Incorrect.

19 Q Okay. Look, if you will, back at Exhibit 333.
20 The fourth paragraph, end of the third line, "we have
21 asked that EPA Region 5 not send a written comment letter
22 during the public comment period."

23 Is that a true statement?

24 A That's a true reading of part of the sentence,
25 which also says "and instead follow the steps and wait

1 until we have reviewed and responded... and made
2 associated changes before sending comments."

3 MR. PENTELOVITCH: Your Honor, could I have the
4 question read back to the witness, please?

5 THE COURT: Yes. Why don't you read back the
6 question beginning with the word "look."

7 THE COURT REPORTER: "Look, if you will, back
8 at Exhibit 333. The fourth paragraph, end of the third
9 line, 'we have asked that EPA Region 5 not send a written
10 comment letter during the public comment period.'"

11 MR. MARTIN: Objection, your Honor. This is
12 getting argumentative.

13 THE COURT: Overruled.

14 BY MR. PENTELOVITCH:

15 Q Answer the question, please.

16 THE COURT: Calls for a yes or no.

17 THE WITNESS: Yes.

18 BY MR. PENTELOVITCH:

19 Q Thank you. Turn, if you will, in Exhibit 333
20 to the page in the original MOA that's numbered 9 -- I'm
21 sorry, 10. I draw your attention to the paragraph that's
22 numbered 3. And it appears that you highlighted that
23 paragraph when you sent the letter or the email to
24 Mr. Thiede. Did you make the choice as to whether to
25 highlight that paragraph, or did somebody else recommend

1 to you that you highlight it?

2 A I highlighted it.

3 Q And is that also true of the highlighting in
4 paragraph 5?

5 A Yes.

6 Q Is there a reason why you didn't highlight the
7 language on the preceding page 9, Section 124.46,
8 Subdivision 1?

9 A So to my recollection, I mean, what I was
10 directing Mr. Thiede's attention to was the concept of
11 the -- all of the information from the public notice
12 period being conveyed to EPA. So I guess I can't say
13 specifically why I didn't highlight the information on
14 the previous page.

15 Q All right. You can set that exhibit aside and
16 take from the pile in front of you Exhibit 60, please.
17 Do you have it?

18 A Yes.

19 Q Exhibit 60 has two emails on that string --
20 actually, it has several emails on the string. But on
21 the first page, the bottom email is -- contains the
22 substance of Exhibit -- of your -- the email that you
23 sent to Mr. Thiede in Exhibit 333, correct?

24 A Yes.

25 Q And then the email at the top of the screen,

1 the first page of Exhibit 60, is an email that you sent
2 to Mr. Thiede approximately an hour and 25 minutes after
3 the preceding email, correct?

4 A Yes.

5 Q And you say, "I apologize for the multiple
6 e-mails, but just wanted to add that I would appreciate
7 knowing that you received this message and a head's up
8 about EPA's intention, given that the public comment
9 period closes this Friday."

10 Why was it important to PCA to know what EPA's
11 intention was given that the public comment period closed
12 Friday?

13 A We were interested in knowing if EPA was
14 planning to send comments or not.

15 Q What difference did it make if you knew before
16 or after the end of the public comment period three days
17 later?

18 A I guess it wouldn't make a difference.

19 Q So why did you ask?

20 A Because we were interested in knowing that.

21 Q And why were you so interested?

22 A I can't give you specific information. It was
23 just something that we were interested in being aware of.

24 Q Were you doing some manpower planning between
25 the 13th and the 16th that required you to have this

1 information?

2 A No.

3 Q Did you have to make staffing decisions between
4 the 13th and the 16th that was dependent upon knowing the
5 answer to this information?

6 A No.

7 Q Turn next, if you would, to Exhibit 61.
8 Exhibit 61 continues the email string on. At the very
9 bottom of the first page, we see the email we just looked
10 at. And there's an email right above that from
11 Mr. Thiede back to you, oh, probably, it looks like,
12 about 20 minutes, 15 or 20 minutes after you sent this
13 email. And he says, "Yes, I have received your
14 correspondence and will plan to reach out yet this
15 evening." Right?

16 A Yes.

17 Q And then there's a couple follow-up emails, and
18 the two of you agree to talk later that afternoon. Am I
19 right?

20 A Yes, that's correct.

21 Q And if you look at Exhibit 62, please.
22 We're still on March 16. There seems to be a
23 time zone disconnect going on here where your email
24 suggests a call at 4:15 or 5:00, and you send that, it
25 looks like, at --

1 THE COURT: I don't have Exhibit 62. It hasn't
2 been offered.

3 MR. PENTELOVITCH: Oh, I'm sorry. My apology.
4 I'll take care of that.

5 Do you have Exhibit 62?

6 THE WITNESS: I do, yes.

7 MR. PENTELOVITCH: Okay. Your Honor, we offer
8 Exhibit 62.

9 THE COURT: Hearing no objection, it's
10 received.

11 BY MR. PENTELOVITCH:

12 Q It seems like you and Mr. Thiede may have been
13 in different time zones when these emails were being
14 written. Does that accord with your recollection?

15 A No. But I'm not sure why -- well, so I believe
16 this is about -- these are about two different
17 conversations actually.

18 Q Oh, they are? Did you have two different
19 conversations?

20 A Yes.

21 Q I see. One is on the 13th.

22 A Correct.

23 Q And then there's one on the 15th.

24 A Correct.

25 Q Okay. I'm sorry. That's my mistake.

1 Tell us about the conversation you had on the
2 13th.

3 A So the conversation that I had on the 13th with
4 Mr. Thiede was a follow-up to the email that I had sent
5 with the request that we were making. It was an
6 opportunity just to introduce ourselves because we hadn't
7 spoken before. So I recall that we spent some time just
8 a little bit on just sort of hello, who are you, what's
9 your background kind of thing. And then, you know, I
10 explained the request that we were making, which was to
11 request that EPA consider waiting to send their written
12 comments until after we had made the changes that we were
13 anticipating for the permit.

14 I recall stressing with Mr. Thiede that we
15 weren't suggesting -- as I did in the email as well, that
16 we weren't suggesting that EPA not comment at all or
17 didn't have the authority to comment, and we were very
18 respectful of that, but that we were requesting the
19 opportunity to improve the work product that EPA was
20 reviewing before they weighed in with their formal
21 written comments. I also recall that that was the time
22 when Mr. Thiede asked if we were suggesting that EPA
23 couldn't comment during the public comment period, and I
24 said no, that the MOA doesn't say that, and we weren't
25 suggesting that EPA didn't have the authority or the

1 ability to comment.

2 We also talked about the idea of the timing. I
3 let Mr. Thiede know that when I had spoke with
4 Mr. Korleski and Mr. Pierard, a concern that they had was
5 about the fact that, you know, if we -- if we were to --
6 if we were to -- well, basically, the concern that they
7 had raised was to ensure that EPA had sufficient time to
8 review the next draft of the permit if they were to
9 decide not to send comments on the draft that was on
10 public notice. And I indicated to Mr. Thiede that, you
11 know, we would be very happy to assure EPA however we
12 needed to that we would get that next draft to them in
13 plenty of time for them to do a thorough review. And
14 then what I recall about that conversation was we left it
15 at he was going to talk further with the staff and
16 leadership within EPA and that he would be getting back
17 to me following those conversations.

18 Q Do you recall anything else that Mr. Thiede
19 said to you during that phone conversation?

20 A No.

21 Q Was anybody else on the phone with you?

22 A No, I don't believe so.

23 Q Do you recall how long the call lasted?

24 A You know, I think it was about a half hour to
25 45 minutes. And the reason why I remember that one is

1 because I was actually on my cell phone, and I was
2 traveling to meet my spouse for dinner, and I ended up
3 sitting in the parking lot for a little bit to finish up
4 the call.

5 Q What parking lot did you sit in?

6 A It was the Bellanotte -- no. I'm sorry. Ciao
7 Bella Restaurant in Edina.

8 Q So it was a 30 to 45-minute phone call?

9 A Yes. Again, as I had mentioned, we had never
10 met before, so we spent some time getting to know each
11 other as a part of that call.

12 Q What did you talk about in the getting to know
13 each other better part?

14 A I recall talking about our backgrounds, you
15 know, what our backgrounds were in public service and in
16 environmental protection, so, you know, where did you
17 start your career, where were you previous to, things
18 like that. So we certainly spent an appreciable amount
19 of time, I can't tell you exactly how much of that time,
20 just kind of sharing pleasantries and information --
21 personal information about our careers.

22 Q In a call that long, did Mr. Thiede take the
23 opportunity to express to you what concerns the EPA might
24 have had about delaying putting its comments in writing?

25 A I really don't recall that -- him expressing

1 concerns. I recall him just kind of asking questions
2 about what it was that the PCA was requesting. And also,
3 I distinctly remember the question about, you know, are
4 you -- is the PCA suggesting that we can't comment,
5 because -- I was glad he asked that question because,
6 certainly, that isn't what we were trying to convey, and
7 so that was the -- I had the opportunity to clarify that.
8 But I don't remember him talking specifically about
9 concerns other than sufficient timing that certainly came
10 up -- or sufficient time for a meaningful review.

11 Q What other questions do you recall him asking?

12 A I don't recall other specific questions.

13 Q Did Mr. Thiede tell you that the EPA letter
14 with its comments was pretty well drafted and ready to
15 send already?

16 A No. I did not know that EPA had drafted a
17 letter.

18 Q He did not mention that?

19 A No. I don't recall him mentioning that.

20 Q When you talked to Mr. Pierard a week or so
21 earlier, or a few days earlier, had he mentioned that?

22 A Not that I recall.

23 Q Okay. Is that -- have you now told the Court
24 everything you recall about that phone conversation?

25 A Yes.

1 Q Now, I take it you were driving for much of it,
2 so you weren't taking any notes.

3 A Correct.

4 Q Did you record it?

5 A No.

6 Q When the call was over, did you jot any notes
7 down or make a memo about the call?

8 A I did not.

9 Q Okay. What's the next thing that happened in
10 the sequence of events?

11 A So the next thing that happened was that on
12 Thursday -- and I know the date because of the email.
13 But Mr. Thiede left a voicemail just to say that he
14 wanted to have a conversation to follow up on the
15 conversation that we had had previously. And so we did
16 have a conversation on the 15th then, and my
17 recollection --

18 Q Well, before you get to your recollection --

19 A I'm sorry. Yeah.

20 Q -- let's set the stage for this phone call.
21 Where were you when it took place?

22 A I believe I was in my office, but I don't
23 remember for sure.

24 Q Approximately how long did the call last?

25 A I don't know.

1 Q Was there anybody else in the room with you
2 when you had the call?

3 A No.

4 Q Was there anybody else on the line besides you
5 and Mr. Thiede?

6 A I don't remember that.

7 Q What did you say to him, and what did he say to
8 you during the call?

9 A What I recall is Mr. Thiede saying that they
10 had discussed the request within EPA and that they were
11 amenable to the idea of holding off on formal written
12 comments until after we had made changes to the draft
13 that we were anticipating and that -- and that -- the
14 idea of ensuring that there was sufficient time for EPA
15 to have a meaningful review so they weren't rushed in
16 that review. And then what I remember is that he had
17 indicated that he would memorialize that in an email and
18 send that to me so that we could then -- we meaning the
19 PCA, could then agree or disagree that that was the
20 process that we were talking about.

21 Q Do you recall anything else that he said to
22 you?

23 A No.

24 Q Do you recall what you said to him?

25 A No.

1 Q Did the term -- let me get this term right.
2 Did the term "pre-proposed permit" come up during the
3 call?

4 A Yes. So that was a term that EPA had suggested
5 for this -- the next draft basically. So to distinguish
6 it from the proposed permit that is provided for a 15-day
7 review within the details of the MOA. So that was
8 something that they had suggested.

9 Q What did he say to you about the pre-proposed
10 permit?

11 THE COURT: Can I ask a question first?

12 MR. PENTELOVITCH: You know, you're the Judge.
13 You get to do it any time you want.

14 THE COURT: Did Mr. Thiede use that term for
15 the first time on March 13, this March 15 call, or at
16 some other time?

17 THE WITNESS: I believe it was March 15.

18 THE COURT: Okay. Go ahead.

19 BY MR. PENTELOVITCH:

20 Q Beware the Ides of March.

21 What did Mr. Thiede say to you that this
22 pre-proposed permit would be like or how it would
23 operate? Did he say anything to you about that?

24 A You know, I don't remember specifics, just that
25 this would be the next draft of the permit that

1 incorporated the changes that we were anticipating and
2 any additional changes that we would make based on the
3 public comment period and the feedback from EPA up to
4 that point. And that would also then include that they
5 would like to see the response to comments as well
6 because that would be helpful in their review.

7 Q During the course of the March 15 -- let me
8 clarify. There was only one conversation on March 15.
9 Is that right?

10 A That's -- yes, I believe so.

11 Q During the course of the one and only
12 conversation on March 15, did either you or Mr. Thiede
13 raise for discussion the question of whether the
14 pre-proposed permit would trigger another public notice
15 period?

16 A No.

17 Q During the conversation that took place on
18 March 15, did either you or Mr. Thiede raise the topic of
19 whether or not an amendment to the MOA was required in
20 order to make this agreement?

21 A No.

22 Q Would it be fair to characterize the agreement
23 that you made on the phone with Mr. Thiede on the 15th as
24 follows: In return for the EPA not submitting written
25 comments during the public comment period, PCA would

1 prepare a pre-proposed permit, and EPA would then have 45
2 days to comment on the pre-proposed permit before the
3 final permit was issued for comment. Is that a fair
4 characterization of the bargain you struck?

5 A No. And I would like to explain why now.

6 Q Go ahead.

7 A Which is that -- that the approach that we
8 agreed to was to provide the next -- to provide the
9 additional time and the next draft of the permit with the
10 changes. What I disagree with is the characterization
11 that it was a, you know, in exchange for EPA not
12 commenting, because while I think I kind of -- because
13 that was never explicitly stated. In fact, you know, I
14 vaguely -- well, I don't believe I knew for sure that EPA
15 wasn't going to submit a comment until EPA didn't submit
16 a comment.

17 Q So it's your testimony that the PCA agreed to
18 prepare a pre-proposed permit and give EPA 45 additional
19 days to comment and got no promise in return from EPA
20 that it wouldn't file a notice -- comments during the
21 public comment period. That's your testimony? You got
22 no promise to that effect?

23 A So it's my testimony that we got no promise to
24 that effect. What I would like to add to that is that I
25 left that conversation with, you know, the feeling -- or

1 the understanding that -- or at least the potential that
2 that then would provide EPA with -- or that EPA would
3 decide not to send a comment during the public comment
4 period as a result. But I do disagree with saying that
5 that was an absolute sort of this for that, because at
6 the end of the day, it's up to EPA to decide, and, you
7 know, they never said, that I recall, okay, if you do
8 this, we won't send a comment. We talked about this
9 process of us sending the updated draft and EPA providing
10 additional feed -- or providing their feedback on that
11 draft, but it wasn't an explicit this for that.

12 Q So is your testimony that the MPCA got no
13 consideration whatsoever from the EPA for agreeing to
14 provide a proposed -- I keep -- PPP as it's referred to
15 and 45 days of comment? So there was no consideration
16 flowing to PCA as part of that bargain?

17 A No. I'm not suggesting that at all. I think
18 that --

19 Q So what was the consideration?

20 A So what I'm suggesting is that -- that EPA
21 certainly was considering that and considering that
22 assurance that there would be this time -- well, my
23 assumption is that EPA -- because I don't know. But my
24 assumption was that EPA was considering that and
25 considering this -- that they would have plenty of time

1 to review the next version of the permit when they made
2 the decision as to whether or not they would send a
3 public comment -- they would send a comment during the
4 public comment period.

5 Q So you got what was called -- what you refer to
6 as an illusory promise, in other words -- or a hope of a
7 promise that they wouldn't comment. But you didn't know
8 that that's not what they would do?

9 MR. MARTIN: Objection, argumentative.

10 THE COURT: Overruled.

11 MR. MARTIN: Objection, asked and answered.

12 THE COURT: Overruled.

13 THE WITNESS: Again, I'm not sure that I
14 would -- I'm not sure I agree with your terminology, but
15 maybe it's because I don't -- but --

16 THE COURT: What's your terminology? Describe
17 precisely the consideration that the MPCA got for the
18 promises -- the new promises that you made to the EPA.

19 THE WITNESS: So my terminology is that that
20 allowed EPA to consider and ultimately decide not to send
21 written comments during the public comment period.

22 THE COURT: So your consideration was that they
23 might not comment during the public comment period?

24 THE WITNESS: Yes. I don't think that it was a
25 guarantee. I mean, certainly, that was our, I guess,

1 hope, because we wanted to be able to provide that
2 updated version for EPA to provide their comments on.
3 But I didn't leave that conversation with a "this
4 absolutely will be the case."

5 BY MR. PENTELOVITCH:

6 Q So let me come at it another way. After your
7 call on March 15, if EPA had filed written comments the
8 following day, which is the last day of the public
9 comment period, would MPCA still have been bound to do a
10 PPP and give them 45 days, or would that deal have been
11 off if they had filed written comments?

12 A I don't know, because that didn't happen. We
13 would have needed to have that conversation.

14 Q So you don't know if you would have had a deal
15 if they had filed written comments? You don't know if
16 there was a deal, right?

17 A Again, I -- I'm not -- I'm not trying to be
18 argumentative, but I'm objecting to the idea of a deal,
19 that it was -- because EPA had all of the authority to
20 make the decision. We weren't in a position to make that
21 decision. So, you know, if EPA had filed comments during
22 the public comment period, what I would anticipate would
23 have happened would be that we would have talked about,
24 okay, you know, it may still make a lot of sense to get
25 another version to EPA and make sure that they had plenty

1 of time because we wanted them to be reviewing our best
2 work product.

3 Q But you wouldn't have felt bound to do it.

4 A Well, no, and EPA wouldn't have potentially
5 felt bound to review it either, so --

6 Q Have you now told us everything that occurred
7 during the March 15 call?

8 A Yes.

9 Q When you got off that call, did you go talk to
10 Mr. Stine and say, here's the offer on the table from
11 EPA, should we take it?

12 A No. When I got off that call, I -- at least I
13 don't believe so. I believe I received the email from
14 Mr. Thiede that articulated their understanding and then
15 checked in with Mr. Stine and Mr. Udd to make sure
16 that -- I believe Mr. Udd, I'm sure Mr. Stine, to see if
17 they had any questions or if -- that, you know, anything
18 that we wanted to clarify with EPA.

19 Q So between the time you spoke to Mr. Thiede on
20 the 15th and the time Mr. Thiede sent you an email
21 confirming the call, you did not speak to Mr. Stine or
22 Mr. Udd about what you had talked about with Mr. Thiede?

23 A I don't recall.

24 Q Did you talk to anybody? Do you recall talking
25 to anybody about what transpired in that call?

1 A I don't recall.

2 Q Let's look at Exhibit 64. Exhibit 64 has two
3 emails on it. The bottom email is the following day,
4 March 16, 12:44 p.m., and it's from Mr. Thiede to you
5 with copies to a number of people at the EPA but to
6 nobody else at the PCA.

7 And if you turn to the second page of
8 Exhibit 64, at the top of the page, Mr. Thiede wrote,
9 "Once MPCA completes their response to public comments,
10 it will develop a pre-proposed permit and provide the PPP
11 to EPA Region 5. Region 5 EPA will have up to 45 days to
12 review the PPP and MPCA's responses to public comments
13 and provide written comments on the PPP to MPCA. This
14 would occur prior to MPCA submitting a proposed permit to
15 EPA, which, according to the current MOA, would continue
16 to give EPA 15 days to comment upon, generally object to,
17 or make recommendations with respect to the proposed
18 permit."

19 Did I read that correctly?

20 A Yes.

21 Q You wrote back an hour and 14 minutes later,
22 "Hi Kurt - Thank you for your message. We concur with
23 your characterization below of what we have agreed to for
24 the PolyMet draft permit next steps."

25 And in addition to the EPA people who had

1 received the initial email, you copied Mr. Stine,
2 Jeff Smith, Jeff Udd, and Michael Schmidt at MPCA,
3 correct?

4 A Yes.

5 Q In those hour and 14 minutes, did you talk to
6 Mr. Thiede -- I'm sorry, to Mr. Stine, Mr. Udd,
7 Mr. Smith, or Mr. Schmidt about the contents of
8 Mr. Thiede's March 16 email?

9 A I'm sure I talked to Mr. Stine. I believe I
10 talked with Mr. Udd, but I'm not as confident on that.
11 And that's all I remember.

12 Q Did you talk to Mr. Stine in person or over the
13 phone?

14 A I don't recall.

15 Q Do you recall what you said to Mr. Stine and
16 what he said to you?

17 A The one thing that I recall is the discussion
18 about the timing of the 45 days kind of prior to then the
19 MOA part of the 15 days and, you know, did that seem like
20 a reasonable time period. But that's what I remember.

21 Q Did Mr. Stine say to you there's nothing in
22 Mr. Thiede's email about them not filing comments during
23 the public comment period, why not?

24 A No.

25 Q Did he say what are we getting in return for

1 this?

2 A No.

3 Q What did he say?

4 A Again, we talked about the timing. And that is
5 what I recall us talking about.

6 Q Did he authorize you to send the email you sent
7 at 2:00 p.m.?

8 A So I -- yes. And -- yes.

9 Q And you said we have agreed, right?

10 A Yes.

11 Q There's an agreement?

12 A Yes.

13 Q Describe for me what EPA was giving you in that
14 agreement. Actually, describe for the Court what the EPA
15 was giving you in that agreement.

16 A What the EPA was giving us was a review of the
17 updated draft of the permit once we had made changes
18 based on the public comments and the things that we
19 already knew and then any additional changes that we were
20 making.

21 Q They already had that, right?

22 A True.

23 Q So what were they giving you that you didn't
24 already have?

25 A Again, as I indicated earlier, the implication

1 was that -- that EPA wouldn't be sending comments during
2 the public comment period. But that wasn't a known
3 until -- a definite known until EPA didn't send comments
4 during the public comment period.

5 Q After you wrote that we have agreed, did you
6 feel that you would be bound to honor the obligation to
7 prepare a pre-proposed permit and give 45 days' notice to
8 review it if the EPA had filed a public comment in
9 writing on March 16?

10 A So I didn't have that thought at the time. But
11 thinking about it now, I would say yes.

12 Q So you would have been able to walk away from
13 the deal?

14 A Well, again, no. Bound to prepare that, I
15 would say yes, we would -- we would do that.

16 Q And have gotten nothing in return from EPA?

17 A Again, EPA reviewing an updated version of the
18 permit is still something.

19 Q They had to do -- they were going to do that
20 anyway, right? They had the right to do that under the
21 MOA and as a matter of law?

22 A They absolutely had the right to do that. At
23 the same time, EPA is very busy. They have a lot of
24 things that they need to do as well. They could have
25 chosen not to review and provide comments on a subsequent

1 version. And we really wanted to get EPA's review and
2 feedback on the improved version of the permit based on
3 the changes that we were already going to be making. So
4 that, to me, is something.

5 Q But that was going to happen anyway, right?

6 A No. What I'm saying is there's nothing that
7 would have required EPA to do that in that 45-day period,
8 you know, that more detailed review.

9 Q Well, they were getting from you an additional
10 draft permit and 30 additional days to review -- 45 days
11 that they otherwise didn't have to review it. And they
12 gave you nothing.

13 MR. MARTIN: Asked and answered.

14 THE COURT: Sustained.

15 MR. PENTELOVITCH: Be a good place for a mid
16 afternoon break?

17 THE COURT: Yes. Let's take it, 20 minutes.

18 (A recess was taken at 3:10 p.m. until 3:35 p.m.)

19 THE COURT: Please remain seated.

20 All right. Away we go.

21 BY MR. PENTELOVITCH:

22 Q Good afternoon, again, Ms. Lotthammer. I need
23 to close the loop on the electronic devices. I guess I
24 left something open earlier.

25 THE COURT: Was there another kind we don't

1 know about?

2 BY MR. PENTELOVITCH:

3 Q I think I didn't ask about your personal cell
4 phone. Did you have a personal cell phone as well as a
5 work cell phone?

6 A Yes, I did.

7 Q What was your work cell phone again? Was that
8 an iPhone?

9 A Yes. Actually, so it had been an android, and
10 then for about the last eight months that I was with the
11 PCA, I had switched to an iPhone.

12 Q I see. So you had an android when you became
13 assistant commissioner?

14 A I believe so, yes. And then --

15 Q And for about how long?

16 A I don't remember exactly how long, but it
17 started to fail, and so then I ended up switching phones
18 to an iPhone.

19 Q That's your work iPhone?

20 A Yes.

21 Q Work cell phone?

22 A Yeah.

23 Q Okay. And do you remember what kind of phone
24 it was? Was it a Samsung or some --

25 A I believe it was a Samsung.

1 Q And do you know what network it was on? Was it
2 T-Mobile or Sprint or AT&T?

3 A It would have been Sprint.

4 Q All right. Let's get back into our chronology.
5 You should have in front of you Exhibit 307, if you could
6 find that. You'll notice that your email to Mr. Thiede
7 is at the lower half of the first page of Exhibit 307.
8 And then there is above that an email from Mr. Udd to
9 Mr. Clark and Ms. Handeland, I assume forwarding your
10 email. And above that, there's an email from Mr. Udd to
11 Mr. Clark and Ms. Handeland referencing a phone call with
12 Kevin. And my first question to you is, did you see
13 Mr. Udd's -- even though you're not identified as
14 receiving a copy, did you see Mr. Udd's email to
15 Mr. Clark and Ms. Handeland on or about March 16, 2018?

16 A No.

17 Q The substance of the email is that Mr. Udd
18 reports that he just got off the phone with Kevin, I
19 believe that's Pierard, and that Mr. Pierard would like
20 to continue with routine check-in meetings every few
21 weeks. Did Mr. Udd tell you about that phone call?

22 A I don't recall that he did.

23 Q At the end of that email, the last sentence
24 says, "He," and I believe that's a reference to
25 Mr. Pierard, "would like to have one the first week of

1 April to walk through what the comment letter would have
2 said if it were sent."

3 Did Mr. Udd ever tell you that?

4 A No.

5 Q Did you know that on April 5 of 2018 there was
6 a conference call between EPA officials and MPCA
7 officials at which EPA officials read to the MPCA
8 officials from the letter that they had intended to
9 submit during the public comment period?

10 A No.

11 Q Did you ever learn that?

12 A I've learned that through this process, but I
13 don't believe I learned that prior to this.

14 THE COURT: This being?

15 THE WITNESS: This being the district court
16 hearing.

17 THE COURT: Okay. So before the Court of
18 Appeals said that the case is coming here, you didn't
19 know that that had happened?

20 THE WITNESS: I don't believe I did.

21 THE COURT: Okay.

22 BY MR. PENTELOVITCH:

23 Q And you didn't know it at any time while you
24 were still at the MPCA?

25 A I don't believe so.

1 Q Okay. You should have in front of you
2 Exhibit 337. If it's not there, let me know.

3 A I don't believe I have it.

4 Q Or I'm sorry. 837. I'm sorry. I can't read
5 my handwriting. Do you have 837?

6 A I don't think so.

7 Q Let me hand you the exhibit. Here you go.

8 MR. MILLS: Excuse me. We do not yet have
9 that.

10 THE COURT: It's not in evidence, I don't
11 think.

12 MR. MILLS: And we've never received a courtesy
13 copy of it.

14 MR. PENTELOVITCH: 837 are Mr. Schmidt's notes,
15 I believe.

16 THE COURT: Oh, okay.

17 MR. PENTELOVITCH: It's pages 27, 28, and 29
18 are the exhibit.

19 You received that from the Court, didn't you?

20 MR. MILLS: We did not.

21 MR. PENTELOVITCH: Oh, well, we'll get you a
22 copy. Do you need to take a look at it before I
23 question?

24 MR. MILLS: I would like to.

25 MR. PENTELOVITCH: Here you go.

1 MR. MILLS: Sorry to interrupt, but this is one
2 we have not had a chance to --

3 BY MR. PENTELOVITCH:

4 Q I'm going to ask you this question about pages
5 27, 28, and 29. Have you ever seen them before?

6 A Not prior to the court proceedings.

7 Q So somebody showed them to you prior to today
8 in connection with preparing for trial?

9 A Yes.

10 Q Okay. Were you aware prior to these court
11 proceedings that Mr. Schmidt had made notes of a
12 conversation between EPA and PCA on March -- on April 5,
13 2018, in which a comment letter was read to PCA over the
14 phone by EPA?

15 A No.

16 Q All right. You can set that aside.

17 Subsequent to the public notice and comment
18 period and prior to drafting the pre- -- I want to get
19 this right, the pre-proposed permit, did EPA -- I'm
20 sorry. Did PCA make substantial changes between the
21 permit that was on public notice and the pre-proposed
22 permit that it subsequently gave to the EPA?

23 A So EPA -- or PCA made a number of changes. I
24 hesitate at the word "substantial" because I don't want
25 to suggest that there were changes that were sort of

1 outside the scope of this permitting process. But there
2 were significant changes that were made.

3 Q Was there any discussion within PCA about
4 whether or not, as a result of making what you call
5 significant changes, there had to be another public
6 notice and comment period for the pre-proposed permit?

7 A Not that I'm aware of.

8 Q Do you know if an affirmative decision was made
9 within the PCA not to put the pre-proposed permit on
10 public notice for comment?

11 A No -- wait. Let me -- what do you mean by
12 affirmative decision? I'm sorry. I'm just trying to
13 understand.

14 Q Was it a conscious decision where they thought
15 about it and decided not to do it?

16 A Not that I'm aware of.

17 Q All right. With respect to Exhibit --

18 A Can I add to that, please?

19 Q No.

20 A Okay.

21 Q You can -- your lawyer or the state's lawyer on
22 direct can ask you whatever you would like.

23 A Okay.

24 Q With respect to Exhibit 333, which was your
25 email to Mr. Thiede on March 13, I believe it was, you

1 deleted that email from your MPCA email account, correct?

2 A Yes.

3 Q When?

4 A I don't know exactly when.

5 Q Why?

6 A Because it was not an email that, in my
7 understanding of our data practices and records policies,
8 that I needed to keep. It had been super -- or the
9 matter had been kind of documented by the email kind of
10 laying out the approach, and I didn't believe that it was
11 something I needed to keep.

12 Q You're talking about Mr. Thiede's email to you
13 on March 15?

14 A Yes.

15 Q But Mr. Thiede's email on March 15 is silent
16 about your request to the EPA not to file written
17 comments during the public notice period, correct?

18 A Yes.

19 Q And nowhere else, nowhere else in PCA's records
20 was there any reference in writing to that request that
21 you're aware of, correct?

22 A Yes, correct.

23 Q So you deleted the only document in PCA's
24 entire database that made any reference in writing to the
25 request to the EPA not to file written comments during

1 the public comment period, correct?

2 A I can't tell you what's in the entire database,
3 but I can -- I can affirm that I deleted the email that I
4 had written.

5 Q And what was there in the records practices
6 manual of the PCA that you thought gave you authority to
7 delete a document that, as far as you know, there was no
8 other document recording a unique and unusual
9 one-of-a-kind request made by PCA to EPA?

10 A Well, first of all, I don't know that this was
11 unique, unusual, or one of a kind, so I just want to say
12 that, but --

13 Q Well, you know of no other instances, do you?

14 A No.

15 Q Okay. Go ahead.

16 A But -- so my understanding of the records
17 policy was that, you know, emails that were in sort of
18 the -- well, or just information that is something in
19 kind of a correspondence nature that isn't a decision of
20 the agency, it doesn't document a decision or a practice
21 or a final document of the agency, was something that I
22 didn't need to keep. And that's what I felt this was.

23 Q Well, it's the only document that reflected
24 that portion of the discussion between PCA and EPA about
25 EPA not filing written comments --

1 MR. MARTIN: Objection, asked and answered.

2 BY MR. PENTELOVITCH:

3 Q -- to the public comment period, correct?

4 THE COURT: Number one, don't interrupt the
5 question.

6 MR. MARTIN: I apologize.

7 THE COURT: Number two, overruled.

8 THE WITNESS: I'm sorry. Could you repeat the
9 question?

10 MR. PENTELOVITCH: Could we have it read back?

11 THE COURT: It wasn't complete because it was
12 interrupted, and I don't have confidence that it was
13 fully stated. So why don't you reformulate the question.

14 MR. PENTELOVITCH: Could I have read back as
15 much as there was to remind me of where I was at?

16 THE COURT: That's fine.

17 THE COURT REPORTER: "Well, it's the only
18 document that reflected that portion of the discussion
19 between PCA and EPA about EPA not filing written
20 comments --

21 "MR. MARTIN: Objection, asked and answered.

22 "MR. PENTELOVITCH: -- to the public comment period,
23 correct?"

24 BY MR. PENTELOVITCH:

25 Q Let me try and reframe the question.

1 To the best of your knowledge at the time you
2 deleted Exhibit 333 from your email, there was no other
3 writing within PCA's records documenting the fact that,
4 as part of the discussions leading up to the March 16
5 email exchange memorializing a so-called agreement
6 between PCA and EPA, your email was the only document in
7 writing that memorialized the request that led to that
8 agreement, correct?

9 A To the best of my knowledge, correct.

10 Q And you knew that -- your expectation and hope
11 was that, at least in return for that agreement, you were
12 going to not receive written comment from the EPA, right?

13 MR. MARTIN: Objection, misstates the evidence.

14 THE COURT: Overruled.

15 THE WITNESS: I'm sorry. Could you repeat
16 that?

17 THE COURT: Read it back, please.

18 THE COURT REPORTER: "And you knew that -- your
19 expectation and hope was that, at least in return for
20 that agreement, you were going to not receive written
21 comment from the EPA, right?"

22 THE COURT: The question is vague and multiple.
23 Expectation and hope are different things.

24 BY MR. PENTELOVITCH:

25 Q Let me try it again.

1 Ms. Lotthammer, you deleted Exhibit 333 knowing
2 that it was the only written documentation of the request
3 that PCA made of EPA not to file written comments during
4 the public notice period that led to the agreement by PCA
5 to prepare a pre-proposed permit and give EPA 45 days to
6 respond to it in return for which you hoped EPA would not
7 file written comments during the public notice period,
8 correct?

9 A So I'm sorry. I'm having trouble following all
10 of that, but I'll try to respond to what I -- so I
11 deleted the email knowing that, at least to the best of
12 my knowledge, this was the only email that contained the
13 request.

14 I need to hear the second part of the question
15 to make sure that I --

16 Q I am satisfied with your answer.

17 A Okay.

18 THE COURT: Okay. So we'll do something else.

19 BY MR. PENTELOVITCH:

20 Q Did you consult with anybody else at PCA before
21 deleting that email about whether it was proper to do so?

22 A I don't believe so.

23 Q Did you tell anybody else that you were
24 planning to do so?

25 A I don't believe so.

1 Q Prior to it coming to light subsequent to
2 the -- subsequent to your departure from the PCA, did you
3 tell anybody that you had deleted that email?

4 A I don't know.

5 Q Do you recall doing so?

6 A No.

7 Q Next exhibit is 573. And Exhibit 573 is the
8 declaration of Sharon [sic] Lotthammer filed in the
9 Minnesota Court of Appeals.

10 THE COURT: There being no objection, the
11 exhibit is received.

12 BY MR. PENTELOVITCH:

13 Q Ms. Lotthammer, I would like you to examine
14 Exhibit 573 and tell me if the signature on page 3 dated
15 June 12, 2019 in Ramsey County, St. Paul, Minnesota, is
16 your signature.

17 A Yes.

18 Q And you signed it under penalty of perjury as
19 stated in the sentence immediately prior to your
20 signature, correct?

21 A Correct.

22 Q Did you write this yourself?

23 A I basically explained to someone who typed it
24 up, and then I reviewed it and made some changes to it,
25 so...

1 Q In paragraph 3 of this declaration filed in the
2 Minnesota Court of Appeals in this case, you state that,
3 "On March 16, 2018, I exchanged emails with Kurt Thiede,
4 who was Chief of Staff of the Office of the Regional
5 Administrator of Region 5 of the U.S. Environmental
6 Protection Agency." And you go on to describe that that
7 email is part of Exhibit 1 to the Declaration of Jeffrey
8 Fowley.

9 My question to you is, why did you not mention
10 the preceding emails on the 13th and 15th that were part
11 of that conversation between you and Mr. Thiede when you
12 signed this declaration?

13 A So this was about the -- kind of the approach
14 to the -- the draft permit basically. And I didn't
15 mention it because I didn't think it was something that
16 needed to be acknowledged. That was the request, but
17 this was the approach that was discussed and
18 memorialized.

19 Q So you had not forgotten about your other
20 emails with Mr. Thiede. You just made a conscious
21 decision not to mention them, right?

22 A Well, you know, and I -- I mean, I -- I didn't
23 consciously remember that I had sent an email to
24 Mr. Thiede. I was focused on the approach that was
25 agreed upon.

1 Q When you say didn't consciously remember, are
2 you saying you had forgotten?

3 MR. MARTIN: Objection, argumentative.

4 THE COURT: Overruled.

5 BY MR. PENTELOVITCH:

6 Q Go ahead.

7 A So I'm sorry. I'm trying to remember back
8 about if I did remember about that email or not. And I
9 think it may be the case that I had forgotten about it.
10 And what I'm struggling with is the fact that, you know,
11 I didn't have that email because I had deleted it and
12 wasn't reminded of it until it had come to light later.
13 So I can't tell you for sure if I remembered that email
14 at this time.

15 Q Now, in paragraph 4 of your declaration, you
16 say, and I quote, "I was involved in the discussions with
17 EPA that resulted, in part, in the April 5, 2018,
18 conference call in which EPA read its comments to MPCA on
19 the public-comment draft of the PolyMet permit. I know
20 the basis for the agreement that Mr. Thiede correctly
21 summarized."

22 You do not mention here anywhere that the basis
23 of that agreement stemmed from EPA -- the request to EPA
24 by PCA not to file written comments during the public
25 comment period, right?

1 A Correct.

2 Q In paragraph 5, you say, "Mr. Thiede's email
3 summarized our agreement on March 16, 2018, which was the
4 last day of the public-comment period on that draft of
5 the permit."

6 Mr. Thiede's email didn't summarize that part
7 of your conversation which led you to hope that PCA would
8 not receive written comments from EPA, correct?

9 A Correct. Well, Mr. Thiede's email summarized
10 the approach that we had agreed to. So correct.

11 Q And you go on to say in the middle of the
12 paragraph, "Rather than have EPA send us written comments
13 on the version of the permit that we knew we were going
14 to change, we believed that it would be more efficient -
15 both for us and for EPA - if EPA waited to give us any
16 written comments based on the next draft, in which we had
17 the opportunity to address concerns shared by the
18 public." Right?

19 A Yes.

20 Q Okay. But you did not, again, mention that you
21 asked EPA not to serve the written comments, correct?

22 A It's correct that it doesn't say that we asked
23 EPA, but it certainly indicates what our thinking was and
24 why we had the conversation with EPA that then was
25 summarized in Mr. Thiede's email.

1 Q All right. You can set that exhibit aside.

2 MR. PENTELOVITCH: The next exhibit is 812.

3 Does the witness have a copy of Exhibit 812?

4 THE WITNESS: Yes.

5 MR. PENTELOVITCH: I've got one for the Court.

6 BY MR. PENTELOVITCH:

7 Q Exhibit 812 is a --

8 THE COURT: There being no objection, it's
9 received.

10 BY MR. PENTELOVITCH:

11 Q 812 is what I'll call an Outlook appointment
12 invitation from somebody named Laura Bishop to a number
13 of people, including yourself. Is that right?

14 A Yes.

15 Q And who is Laura Bishop?

16 A Laura Bishop is the current commissioner and at
17 the time was the new commissioner of the Pollution
18 Control Agency.

19 Q And you were one of the invitees of this
20 meeting, correct?

21 A Yes.

22 Q Which was to take place on January 24, 2019,
23 from 4:30 to 5 p.m., correct?

24 A Yes.

25 Q And the subject was to brief Laura on PolyMet,

1 correct?

2 A Correct.

3 Q Did you attend that meeting?

4 A I believe so, but I don't recall specifically.

5 Q What was discussed during that meeting?

6 A I don't remember.

7 Q You have no recollection whatsoever?

8 A I don't.

9 Q Did you at this point know you were leaving for
10 the DNR?

11 A I knew that I was considering leaving for the
12 DNR. And I should have looked and didn't look to
13 remember exactly the sequence of dates around that.

14 Q You knew by January 24 that there had been a
15 certiorari appeal to the court of appeals for the permit,
16 correct?

17 A So that -- yes, that it -- I'm not sure I know
18 what certiorari means, but that there had been an appeal
19 to the court of appeals.

20 THE COURT: Let me jump in. You said you
21 couldn't recall the meeting. Do you recall who presided
22 over the briefing of Ms. Bishop about PolyMet? Who led
23 the briefing?

24 THE WITNESS: I don't recall. I would have
25 anticipated that it would have been kind of a team effort

1 because there were multiple people involved.

2 THE COURT: Okay.

3 BY MR. PENTELOVITCH:

4 Q And by this point in time, there had been
5 publicity promoted by WaterLegacy regarding the EPA
6 review of the PolyMet permits. Was that discussed at the
7 meeting with Ms. Bishop?

8 A I don't -- I don't know. I don't remember
9 specifically.

10 MR. PENTELOVITCH: Exhibit 271 is next.

11 THE COURT: Yet to be received.

12 BY MR. PENTELOVITCH:

13 Q Now, Exhibit 271 is a document from a week
14 earlier, January 17, 2019.

15 THE COURT: There being no objection, it's
16 received.

17 BY MR. PENTELOVITCH:

18 Q It's to -- I am sorry. It is from you to
19 Laura Bishop, Dave Verhasselt, V-e-r-h-a-s-s-e-l-t,
20 Michelle Beeman, Greta Gauthier, G-a-u-t-h-i-e-r, with
21 copies to Adonis Neblett and Michael Schmidt, correct?

22 A Yes, and also copies to Jeff Udd and
23 Jeff Smith.

24 Q Thank you. I think we know who Ms. Beeman is
25 from prior testimony. Who is Mr. Verhasselt?

1 A He was the communications director at the time.

2 Q Who is Greta Gauthier?

3 A Greta was and is an assistant commissioner at
4 the PCA.

5 Q Who is Mr. Neblett?

6 A The general counsel for the PCA.

7 Q And he's here in the room today, correct?

8 A Yes.

9 MR. PENTELOVITCH: Wave at the judge,
10 Mr. Neblett. There we go.

11 BY MR. PENTELOVITCH:

12 Q And Mr. Schmidt was a lawyer as well, correct?

13 A Yes.

14 Q Now, you write in Exhibit 271, "Below are
15 talking points that Jeff Udd and Mike Schmidt prepared
16 regarding the claims made by Paula Maccabee of Water
17 Legacy regarding EPA review of the PolyMet permits."

18 Why was it felt that the PCA needed talking
19 points regarding this subject?

20 A Because we were getting media inquiries about
21 that topic, and so it was important to have that
22 information in one place.

23 Q In order to convey it to the media and from the
24 media to the public. Is that right?

25 A In order to convey it to the media, yes.

1 Q And you expected the media would convey it to
2 the public, correct?

3 A Yes.

4 Q Now, if you look at the bottom of the page,
5 there's an email from Mr. Udd to you with a copy to
6 Mr. Schmidt that says, "Below are general talking points
7 regarding the claims made by WaterLegacy on the PolyMet
8 permits."

9 First bullet point says, "In response to
10 several DPA requests from WaterLegacy on the PolyMet
11 project, we provided numerous documents, emails, and
12 handwritten notes."

13 Now, had you deleted Exhibit 333 as of the date
14 of this email, January 17?

15 A Yes, I believe I had.

16 Q Had you deleted it before the permit was
17 issued?

18 A I believe so.

19 Q Do you recall, relative to when you wrote
20 Exhibit 333, when you deleted it?

21 A You know, I must have deleted it sometime
22 between when I wrote it and when we received a Data
23 Practices Act request, because if I had had it at the
24 time that we received the request, I would have produced
25 it. But I can't -- I can't specify more than that.

1 Q The fourth bullet point says, "EPA did not send
2 a comment letter during the comment period, but rather
3 chose to let the public notice process conclude and
4 review any changes made to the permit, along with MPCA's
5 responses to comments received, as a result of the public
6 process." Correct?

7 A Yes.

8 Q And the next bullet point is "The MPCA provided
9 additional time to EPA to review the permit documents
10 prior to any final decision on the permit issuance."
11 Correct?

12 A Yes.

13 Q Now, none of these bullet points reference any
14 sort of agreement between the two agencies, nor do they
15 reference the fact that there was to be a pre-proposed
16 permit. Isn't that right?

17 A Actually, I disagree. The bullet about
18 providing the additional time to review the permit
19 documents is in reference to that.

20 Q But it doesn't mention the pre-proposed permit.

21 A It doesn't use the term "pre-proposed permit,"
22 but I still think it references that.

23 Q And it does not reference the fact that the
24 comment letter was not sent at the request of the PCA,
25 correct?

1 A Again, I wouldn't explain it -- or I wouldn't
2 say it that way, because the comment letter was not
3 sent -- well, first of all -- well, yeah -- I mean, EPA
4 had made the decision to send a comment letter or not
5 send a comment letter, and it wasn't -- it's never the
6 case that the PCA asks something and then EPA does it.
7 EPA makes those decisions. They have that authority.

8 Q The last bullet point there says, "There is no
9 information in what we provided that suggests that EPA
10 was directed to suppress comment."

11 Now, let's begin with, when you say there's no
12 information in what we provided, all you're referring to
13 is what was provided in response to the Government Data
14 Practices Act request, right?

15 A I don't know, because Mr. Schmidt and Mr. Udd
16 wrote those comments, but -- so --

17 Q But you're forwarding them to a whole group of
18 people.

19 A Yeah. So that was my assumption, but I don't
20 want to --

21 Q So that's --

22 A -- assume that.

23 Q -- how you understood it.

24 A Yes.

25 Q Okay. And it also goes on to say, "There is no

1 information in what we provided that suggests that EPA
2 was directed" --

3 (Reporter clarification.)

4 THE COURT: Read the bullet point from the
5 beginning.

6 MR. PENTELOVITCH: The whole bullet point?

7 THE COURT: Just start over so we get a clear
8 record.

9 BY MR. PENTELOVITCH:

10 Q Yeah, I got that.

11 "There is no information in what we provided
12 that suggests that EPA was directed to suppress comment."

13 And that's true, you did not direct EPA to
14 suppress comment, right?

15 A Correct.

16 Q You asked them not to comment.

17 A We asked them to hold off on commenting until
18 they reviewed an updated draft.

19 Q And was there an affirmative decision made not
20 to disclose that in your media release?

21 A No.

22 Q But you didn't disclose it in your media
23 release ultimately, did you?

24 A We didn't speak to the fact that PCA had made a
25 request. That's true.

1 Q You didn't go public with it, in other words.

2 MR. MARTIN: Objection, argumentative.

3 THE COURT: Sustained.

4 MR. PENTELOVITCH: The next exhibit is 270.

5 THE COURT: There being no objection, it's
6 received.

7 BY MR. PENTELOVITCH:

8 Q Now, Exhibit 270 is an email string that
9 continues the string we were just looking at in the
10 preceding exhibit. On the front page of Exhibit 270
11 is an email from Mr. Verhasselt to you, copies to
12 Laura Bishop and others, also dated January 17. And he's
13 responding to the bullet points that Mr. Udd had sent
14 you. And he says, "I think the last 3-4 bullets are
15 strongest and should be up higher. The first 3-4 feel
16 more like the context" -- "feel more like context."

17 Mr. Smith responds to both you and
18 Mr. Verhasselt that he felt that was a good summary
19 and felt that these should be shared with
20 Congresswoman McCollum's staff. Was it, in fact,
21 shared with Congresswoman McCollum's staff in the
22 form suggested by Mr. Verhasselt?

23 A I don't recall.

24 Q Okay.

25 MR. PENTELOVITCH: Next exhibit is 155.

1 BY MR. PENTELOVITCH:

2 Q Exhibit 155 continues -- or is a new email. It
3 doesn't have any others on the chain, and --

4 THE COURT: Hearing no objection, Exhibit 155
5 is received.

6 BY MR. PENTELOVITCH:

7 Q And it's the next day, January 18, 2019, from
8 Mr. Verhasselt to Greta Gauthier, Laura Bishop, and you.
9 And it says, "Hi Greta, Here are remodeled talking points
10 from mining staff, Shannon and myself on the Water Legacy
11 allegation relating to your call to Congresswoman
12 McCollum." And then there's a number of bullet points
13 there.

14 Is it correct that you worked with
15 Mr. Verhasselt and the mining staff to put together the
16 bullet points that are set forth there in bold on
17 Exhibit 155?

18 A So I don't remember the level of conversations
19 that happened from the version that I had sent -- you
20 know, from the time when Mr. Verhasselt provided comments
21 to this version, so I don't recall to what extent or if I
22 was a part of that. I'm assuming that it was based on
23 that comment, but I don't know if this is referring to --
24 if Dave's comment is referring to kind of the earlier
25 exchange or -- and I just don't remember the details.

1 Q The first bullet point there says, "There is no
2 information in what we provided that suggests that EPA
3 was directed to suppress comment (by MPCA or anyone
4 else)," and the words "no information in what we
5 provided" is underlined. Why were those words
6 underlined?

7 A I don't know.

8 Q The next bullet point says, "EPA did not send a
9 comment letter during the comment period, but rather
10 chose to let the public notice process conclude and
11 review any changes made to the permit, to make the entire
12 process more time efficient and less duplicative and to
13 complement MPCA's responses to comments received, as a
14 result of the public process."

15 This bullet point, as I read it, implies that
16 it was EPA that felt that it would make things more
17 efficient and less duplicative. But in your testimony
18 earlier, you never mentioned Mr. Thiede telling you that.
19 Did he say that to you at any time?

20 A Well, first of all --

21 Q Did he tell that to you at any time?

22 MR. MARTIN: Objection. The witness should be
23 permitted to complete her answer.

24 THE COURT: It's a yes or no answer. That's
25 all you should -- all you should respond, yes or no to

1 the question.

2 THE WITNESS: I don't know.

3 BY MR. PENTELOVITCH:

4 Q You don't recall?

5 A I don't recall.

6 Q What is the basis in this bullet point for
7 suggesting that EPA thought it would be more time
8 efficient and less duplicative?

9 A I don't think that was the intent of this
10 bullet point. I don't read it as attributing that to
11 EPA.

12 Q Okay.

13 Let's turn next to Exhibit 280. Exhibit 280 is
14 a January 18 email from Ms. Beeman to you,
15 Mr. Verhasselt, Greta Gauthier.

16 THE COURT: Do you have an extra one?

17 MR. PENTELOVITCH: Oh, I'm sorry. I'm holding
18 it in my hand. Trying to figure out why I'm holding it
19 in my hand. It's getting late, and I'm getting old.

20 THE COURT: There being no objection, and I
21 don't mean to that last comment of yours, the exhibit is
22 received.

23 MR. PENTELOVITCH: It will be hard to deny the
24 last comment.

25 THE COURT: The opportunity presented itself,

1 so I --

2 MR. PENTELOVITCH: You know, I give people
3 straight lines way too often in my life.

4 BY MR. PENTELOVITCH:

5 Q In Exhibit 280, at the bottom, you'll see the
6 email from Mr. Verhasselt that we were just looking at in
7 Exhibit 155, and there is a email from you thanking him
8 and saying, it "looks great. I added a couple minor
9 points for further clarity, and an additional sentence
10 about our interactions with EPA during their review, in
11 case that is useful."

12 And if you turn to the back, are you able to
13 identify for us what changes you made in his email?

14 A I believe it was the -- in the third bullet,
15 the second sentence, that MPCA met with EPA staff to talk
16 through changes made to the permit and made additional
17 refinements based on their suggestions.

18 Q All right. We're going to Exhibit 154 next.
19 For the record, Exhibit 154 is an email from you to Laura
20 Bishop dated January 18 -- also dated January 18, 2019.
21 It does not look like there's anything else on that
22 string.

23 THE COURT: Hearing no objection, the exhibit
24 is received.

25 BY MR. PENTELOVITCH:

1 Q And the subject line of Exhibit 154 is "Status
2 and next steps re: Water Legacy comments about EPA review
3 of PolyMet permits," correct?

4 A Yes.

5 Q And then right at the middle of the page,
6 there's an underlined heading that says "What actually
7 happened (Our analysis/Talking Points)."

8 And the talking points there are essentially
9 the ones we've just been looking at, correct?

10 A Yes.

11 Q And then there are "Proposed Next Steps" as
12 well, correct?

13 A Yes.

14 Q And those included communicating to
15 the Governor, sharing your analysis with
16 Congresswoman McCollum, and sending a press release
17 to set the record straight. Is that right?

18 A Yes.

19 MR. PENTELOVITCH: Exhibit 269 is next.
20 Exhibit 269, for the record, is an email string that
21 begins, it looks like, on January 30, 2019, and contains
22 a number of emails all on that day.

23 Offer Exhibit 269.

24 THE COURT: Hearing no objection, it's
25 received.

1 BY MR. PENTELOVITCH:

2 Q If we start at the bottom of the email string,
3 which would be on the third page of the exhibit, it
4 starts with an email from somebody named Jennifer
5 B-j-o-r-h-u-s, whose email address is at startribune.com,
6 correct?

7 A Yes.

8 Q And you know that *Star Tribune* is a newspaper,
9 correct?

10 A Yes.

11 THE COURT: She might even be here.

12 MR. PENTELOVITCH: I don't know her, so I don't
13 know if that's true or not.

14 THE COURT: You just look at her who is
15 grinning the most.

16 MR. PENTELOVITCH: You know, shoutouts are
17 always good, right?

18 THE COURT: Ask Mr. Neblett.

19 BY MR. PENTELOVITCH:

20 Q The email from Ms. Bjorhus to Mr. Verhasselt
21 which starts this chain says, "I need to" -- I'm looking
22 at the second paragraph. "I need to confirm that the EPA
23 did not give the MPCA its final comments on that permit
24 in some other format, say, via telephone with no notes
25 taken, or something like that. I hope you can confirm

1 this for me."

2 Did I read that correctly?

3 A Yes.

4 Q And at the top of that page, Mr. Verhasselt
5 sends an email to you and Mr. Smith and Mr. Udd that says
6 "FYI - Shannon - do you and Jeff U. want to think about
7 addressing the request below please?"

8 Is that correct?

9 A Yes.

10 Q And Mr. Udd responds with a copy to you and to
11 Mr. Verhasselt saying, essentially, the talking points
12 that we have previously looked at, right?

13 A I would say a subset of that, but yes.

14 Q Okay. And then you respond above that saying,
15 "I would add that we met with EPA prior to their final
16 review to discuss the permit - after we made changes
17 based on public comment - and we made changes based on
18 the conversations with EPA." Correct?

19 A Yes.

20 Q Now, you personally didn't meet with EPA, did
21 you?

22 A I was part of a meeting in September with EPA.

23 Q Was that the only time?

24 A That I was a part of a meeting, yes.

25 Q Okay. Thanks.

1 Then, if you look at the bottom of the next
2 page, you send an email on January 30 at 4:06 to
3 Mr. Verhasselt, Mr. Udd, and Laura Bishop and
4 Ms. Gauthier saying, "Here is the full set of talking
5 points/information on this." And again, you repeat most
6 of the talking points we've looked at before, right?

7 A Yes.

8 Q Mr. Verhasselt then at 4:16 p.m. says, "So
9 there's no written record of that meeting?"

10 And you respond, "Not sure if we have any notes
11 from the meeting, Jeff?"

12 Am I correct?

13 A Yes.

14 Q And you go on -- and then Mr. Udd responds to
15 you saying, "No notes that I know of. Everything we had
16 we turned over during the DPA request, so Jennifer has
17 all of it."

18 And then you respond saying, "Thanks, Jeff. We
19 certainly have documentation of the meeting in the form
20 of our Outlook appointments of that matters." Correct?

21 A Yes.

22 Q Were you unaware on January 30, 2019, of
23 Mr. Schmidt's notes of that meeting that we saw a few
24 moments ago in Exhibit 837?

25 A Yes.

1 Q Did you ask anybody who participated in the
2 April 5 meeting if there were notes of that meeting?

3 A No.

4 Q Why not?

5 A Because I didn't have reason to ask for any
6 notes from one of the many meetings they had with EPA.

7 Q So you were content to indicate that there were
8 no notes without doing a thorough or comprehensive check
9 to determine whether that was true or not. Is that a
10 correct statement?

11 A Actually, so I actually think that we're
12 talking about two different meetings, because my
13 understanding of this exchange and when I was talking
14 about meeting with EPA, I was referring to the meeting
15 that occurred in September to talk about the -- where we
16 were at with the draft permit before we submitted that to
17 EPA in October. So I wasn't thinking about any other
18 meetings or times. And in fact, my understanding of --
19 in reading the request from Ms. Bjorhus was that EPA --
20 did EPA comment on the draft in any way, the, you know,
21 the final draft that they were reviewing.

22 Q So you don't believe this is a reference to the
23 April 5 meeting at all?

24 A No.

25 Q And so in connection with the contacts that PCA

1 was having with the media in January, there was no
2 disclosure of either the request to EPA not to comment or
3 the fact that the comments had been read on the phone and
4 that there might be notes of that. Is that a fair
5 statement?

6 A Yes, because the context was the fact that EPA
7 had not provided a written comment on the final draft
8 permit.

9 Q Okay.

10 A So that just -- things prior to that, in our
11 understanding, wasn't in the context of the media
12 requests we were receiving.

13 Q All right.

14 Next exhibit is Exhibit 65. That's an email
15 from Mr. Thiede to you on January 31, 2019, correct?

16 A Yes.

17 MR. PENTELOVITCH: Offer Exhibit 65.

18 THE COURT: Hearing no objection, it's
19 received.

20 BY MR. PENTELOVITCH:

21 Q Mr. Thiede says, "There appears to be a lot
22 going on with the issue you flagged for me a couple weeks
23 back. Wondering if you had a few minutes to touch base
24 today or tomorrow?"

25 Let's start with the issue you flagged for him.

1 What is he referring to?

2 A I don't remember.

3 Q Did you have a conversation with him on or
4 about January 31?

5 A I don't remember.

6 Q Do you know if it was about the fact that there
7 was allegations regarding the EPA and whether or not it
8 had made comments?

9 A I don't know.

10 Q You have no recollection of this whatsoever?

11 A I don't.

12 Q And seeing this does not refresh your memory?

13 A It doesn't.

14 Q Okay. The next exhibit is 250.

15 Exhibit 250 has several emails on it, the first
16 one being one from you to Mr. Thiede on January 31, 2019,
17 at 10:47 a.m., correct?

18 A Yes.

19 Q And that --

20 THE COURT: There being no objection, the
21 exhibit is received.

22 BY MR. PENTELOVITCH:

23 Q That would be 43 minutes after Exhibit 65.

24 And in that email, you say to Mr. Thiede and to
25 LindaHolst@EPA.gov, "Hello! Below is the information

1 we've been sharing with folks who ask about the recent
2 news releases and reports about MPCA and EPA's
3 interaction on the PolyMet permit review. Please give me
4 a call if you have any questions." And then you list the
5 talking points that we've been discussing here this
6 afternoon, right?

7 A Yes.

8 Q And then if you look at the email above that,
9 you immediately tell Ms. Bishop that you had shared the
10 summary information with the EPA, correct?

11 A Yes.

12 Q All right.

13 Next I'm going to go to Exhibit 798. 798 is
14 another series of emails within the PCA. Is that
15 correct?

16 A Yes.

17 THE COURT: There being no objection, the
18 exhibit is received.

19 BY MR. PENTELOVITCH:

20 Q And they are all dated, I believe, February 1
21 of 2019. Is that right?

22 A Yes.

23 Q And these have to do with what the Governor is
24 going to be told. Isn't that right?

25 A I don't know that these are about what the

1 Governor is going to be told. It's communication just
2 up -- or letting the Governor's office know about that
3 information. We have, you know, contacts and policy
4 advisors to maintain information flow within the
5 Governor's Office, but that doesn't necessarily go to the
6 Governor.

7 Q All right. Well, let's look at the last page
8 of the exhibit, at least the last page with an email on
9 it. There's an email there at the bottom from
10 Mr. Verhasselt. I believe it's addressed to you, since
11 you respond. And he suggests that -- he says there's a
12 request for comment, and he suggests that you could do an
13 interview. "An interview is perceived to be more open
14 and less defensive, but I know there are legal
15 considerations."

16 Did you do an interview?

17 A I don't believe I did.

18 Q Okay. And then as you move up through the
19 emails, there is an email from Greta Gauthier referencing
20 a discussion with Logan O'Grady. Do you know who
21 Logan O'Grady was?

22 A No.

23 Q Do you know who Kristin Beckmann is?

24 A Yes. Kristin Beckmann is in the communications
25 office for the Governor's Office.

1 Q Okay. If you look in the middle of the second
2 page of the emails, there's an email from Logan O'Grady
3 to Greta Gauthier on which you and Ms. Bishop and others
4 are copied and asks, "Can you guys draft a comment and
5 send it to me and Kristin Beckmann for approval?"

6 Why would you be having to draft a comment and
7 send it to somebody in the Governor's Office for
8 approval? Do you know?

9 A Yeah. It's standard practice when we're
10 putting out a statement for the media as opposed to
11 responding to a question for that to be routed through
12 the Governor's communications office. That happens all
13 the time with all sorts of issues.

14 Q Okay. Would it refresh your recollection if I
15 told you that Logan O'Grady was a policy advisor tasked
16 with mining issues in the Governor's Office? Does that
17 refresh your memory as to who Logan O'Grady is?

18 A No.

19 Q At any time in January or February of 2019 up
20 to the point when you left for the DNR, did you tell
21 anybody about the email with a request to the EPA to
22 delete -- or not to -- not to submit comments during the
23 public notice period, that you had deleted that email?
24 Did you tell that to anybody?

25 A I don't know.

1 Q Did you ever tell anybody that it existed at
2 one time?

3 A I don't know. I certainly had -- folks knew
4 that we had made the request. And so that was definitely
5 something that I had communicated.

6 Q Can you go back to Exhibit -- Okay. Can you go
7 back to Exhibit 60, please? Is that in front of you?

8 Did you delete Exhibit 60 at some time before
9 you left the PCA?

10 A Yes.

11 Q Why?

12 A Again, because I didn't believe it to be
13 something that I needed to keep because it was -- it
14 wasn't a -- I didn't believe it to be a record that I
15 needed to keep.

16 Q Did you consult with anyone before deleting it?

17 A No.

18 Q Would you --

19 A I don't believe so anyway.

20 Q Would you look at Exhibit 61, please? Did you
21 delete that exhibit before you left the PCA?

22 A Yeah, I believe so.

23 Q Did you consult with anyone before doing so?

24 A I don't believe so.

25 Q Look at Exhibit 62, please. Did you delete

1 that before you left the PCA?

2 A I believe I did, yes.

3 Q And did you consult with anyone before doing
4 so?

5 A I don't believe so.

6 Q Look at Exhibit 64, please. Did you delete
7 Exhibit 64 before you left the PCA?

8 A I don't know. I don't know if I deleted it.

9 Q You don't recall?

10 A No.

11 Q With respect to Exhibits 61 and 62, can you
12 tell us approximately when you deleted them?

13 A Yes. It must have been between the -- when
14 the -- when Mr. Thiede sort of summarized the approach
15 that we had agreed to and sent that email and then when a
16 Data Practices Act request came in regarding interactions
17 with EPA, because I didn't produce it at that time, so I
18 must not have had it.

19 Q Who besides Mr. Stine and Mr. Udd at PCA knew
20 that you had made a request of EPA not to submit written
21 comments during the public notice period?

22 A I'm not sure that anybody else knew.

23 Q So just the three of you knew?

24 A Well, I guess I don't know for sure, but --

25 Q Do you --

1 A -- I know those three did. I'm not sure if
2 anybody else did.

3 Q Do you recall telling anybody else you had made
4 that request?

5 A I don't recall discussing it with anyone else.

6 MR. PENTELOVITCH: Your Honor, I have no
7 further questions.

8 THE COURT: All right. We'll resume tomorrow
9 morning with direct examination.

10 MR. MARTIN: Yes, your Honor.

11 THE COURT: Is that the plan?

12 MR. MARTIN: That is the plan.

13 THE COURT: All right. An estimate of how long
14 that will take? I don't know how much good that does me,
15 but it's reassuring, and it will help me sleep.

16 MR. MARTIN: I don't expect a whole lot of
17 questions, so I'll say an hour to two hours.

18 THE COURT: You might as well have said a week.
19 Okay. Teaches me for asking.

20 All right. Have a pleasant evening.

21 Any housekeeping measures?

22 Okay. Thank you.

23 (Proceedings were adjourned for the day at 4:33 p.m.)

24 *****

25

1 STATE OF MINNESOTA)
) SS.
 2 COUNTY OF RAMSEY)

3
 4 REPORTER'S CERTIFICATE

5 I, Lori Morrow, Registered Merit Reporter,
 6 Registered Professional Reporter, Certified Realtime
 7 Reporter, Certified LiveNote Reporter, Certified
 8 Broadcast Captioner, and Notary Public in and for the
 9 State of Minnesota, do certify that I am an official
 10 court reporter in and for the County of Ramsey, Second
 11 Judicial District, State of Minnesota, and that I
 12 reported the foregoing proceedings in this matter, and
 13 that the transcript contained on the foregoing
 14 pages 426 through 644 constitutes a true and accurate
 15 record of the proceedings had in the above-entitled
 16 matter at the said time and place stated herein.

17
 18 Dated: March 2, 2020.

19
 20 

21 _____
 22 Lori L. Morrow, RMR, RPR, CRR, CBC, CLR
 23 Official Court Reporter
 24 Ramsey County Courthouse, Chambers 1470
 25 15 West Kellogg Boulevard
 St. Paul, Minnesota 55102
 (651) 266-8281
 Notary Public, Minnesota
 My commission expires: January 31, 2025